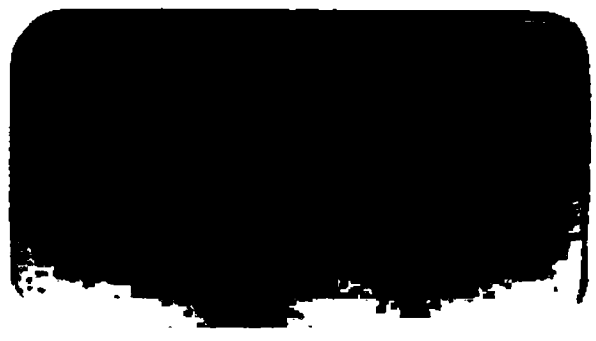

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A

DIGEST

OF

THE LAW OF REAL PROPERTY.

BY WILLIAM CRUISE, ESQ.

BARRISTER AT LAW.

REVISED AND CONSIDERABLY ENLARGED

BY HENRY HOPLEY WHITE, ESQ.

BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

FURTHER REVISED AND ABRIDGED, WITH ADDITIONS AND NOTES FOR THE USE OF AMERICAN STUDENTS,

BY SIMON GREENLEAF, LL.D.

EMERITUS PROFESSOR OF LAW IN HARVARD UNIVERSITY.

IN SEVEN VOLUMES.

VOLUME III.

CONTAINING

Title 21. Advowson.
22. Tithes.
23. Common.
24. Ways.
25. Offices.
26. Dignities.
Title 27. Franchises.
28. Rents.
29. Descent.
30. Escheat.
31. Prescription.

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DIGEST

OF THE

LAW OF REAL PROPERTY.

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ADVOWSON.

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TITLE XXIII.

COMMON. †

BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES. Book II. ch. 3, § 3.
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2. *Common of Pasture.*
3. *Appendant.*
10. *Appurtenant.*
15. *Because of Vicinage.*
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48. *Rights of the Commoners.*
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72. *Extinguishment of Common.*
73. I. *By Release.*
74. II. *By Unity of Possession.*
82. III. *By Severance.*
83. IV. *By Enfranchisement of Copyholds.*
86. *Common may be revived.*

SECTION 1. Common is a *right or privilege* which one or more persons have, to take or *use some part or portion of that which another person's lands, waters, woods, &c., produce.* It *commenced* in some agreement between the lords of manors and their tenants, for valuable purposes; and being continued by usage, is good and valid at present, though there be no deed or instrument in writing to prove the original grant. (*a*) [1]

(*a*) (12 S. & R. 32. 10 Wend. 647.)

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† [See the Stat. 2 & 3 Will. 4, c. 71.]

[1] The origin and legal import of the word "*common*" is examined by Mr. Schultes in the following very satisfactory manner. "*Common* is derived by some from Κοινοω, which, agreeable to the Grecian etymology, is *communico cum aliquo.* By others it is derived from *communis*, as compounded of *con*, together, and *munus*, a gift or office; but according to Bracton and Fleta, the earliest of our law writers, *common*, in legal acceptation, is derived from *communia*, a word compounded of *una* and *cum*, and we think

2. The most general and valuable kind of common, is *common of pasture;* which is a right of feeding one's beasts in another's

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implies, according to its literal interpretation, not only a right or service exercised together with others, but such an intercourse as may be freely enjoyed; and the strongest circumstance to justify this presumption is, that *common, e. g.* common of fishery, might be a free tenement, the nature of which we have before explained. It appears to be an old legal term of designation, signifying a freedom of partaking some benefit with others; thus, for instance, common of pasture is a freedom to depasture cattle coextensively with others, and to receive a benefit which is not defined by separate quantity, extent, or individual limitation.

"All commons, of which there are various descriptions, are rights or services, as where one man gives to others a liberty to use or perform any thing in his own soil; but it seems although the grantor has certainly a power to exercise the same privilege with them in common, yet it does not fall under the denomination of right or service '*quia nemini servit suus fundus proprius*,' because no right or liberty can be considered as belonging to a man severally and distinctly, in respect of land whereof he is the exclusive owner. And so if one purchases the land in which he is entitled to have common, such right ceases or becomes merged.

"Common in another's soil may be established by purchase, by vicinity, by grant, by consent of parties, and it may be established without any specific constitution or grant, but by long, uninterrupted, and peaceable usage and enjoyment; and as it may be acquired by long usage and consent, so it may be lost by disuse and negligence.

"Common, considered as a social privilege, is not confined to pasture, fishery, turbary, &c., merely, though it is commonly used substantively, but it may be applied to the general class of rights, so often recited by Bracton and Fleta, namely, 'jura pascendi in fundo alieno, fodiendi, eundi, agendi, hauriendi, piscandi, aquamve ducendi, venandi, et alia jura infinita,' and whether such commonable rights be mentioned substantively, or participally, can make no material alteration as to their effect.

"Where common and public rights are alluded to in the books, we consider them usually as having the same meaning, and implying freedom. The civilians frequently blend them together, though they profess a distinction between public, common, and private things; this is apparent by this passage amongst many others which might be adduced: 'All rivers and ports are *public*, and therefore the right of *fishing* in a port or in rivers is in *common;*' and, besides, in the old annotation on the Pandects of Justinian, (in Bibliotheca Bodleiana,) the word *public* is expressly defined *common (publicum id est commune.)* Fleta, also, who transcribes copiously from the Imperial law, says, some things are *common*, as the air, the sea, and sea-shore, and others are *public*, as the right of fishing and using rivers and ports, 'aliæ communes sunt, ut aer, mare, et littus maris, aliæ publicæ, ut jus piscandi, et applicandi flumina et portus.'

"This public or common right of fishing relates to public streams, and is contradistinguishable from rights or services belonging to private property.

"Both Bracton and Fleta acknowledge a general distinction between public and common things; thus they call those things public which relate to the use of mankind only, and those common which respect all living animals indiscriminately. And some writers make this distinction that things are common, which do of their own nature and original afford equal advantage to man and other animals, and they are therefore said to be common, because they are in common according to the natural use of them as air and water, but those things are said to be public which are only for the public use and service of men. For the word *publicum* is derived from the word *populus*. Hence, if

land; for in those waste grounds which are called commons, the property of the soil is generally in the lord of the manor. This kind of common is either *appendant*, *appurtenant*, because of *vicinage*, or *in gross*. (*a*)

3. *Common appendant* is a right annexed to the possession of * land, by which the owner thereof is entitled to feed his beasts on the wastes of the manor. The origin of which is thus described by Lord Coke. "When a lord of a manor, wherein were great waste grounds, did enfeoff others of some parcels of arable land, the feoffees, *ad manutenendum servitium socæ*, should have common in the said wastes of the lord, for two causes; first, as incident to the feoffment; for the feoffee could not plough and manure his ground without beasts, and they could not be sustained without pasture; and by consequence the tenant should have common in the wastes of the lord for his beasts, which do plough and manure his tenancy, as appendant to his tenancy; and this was the beginning of common appendant. The second reason was for maintenance and advancement of agriculture and tillage, which was much favored in law." (*b*)

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4. Common appendant must be time out of mind, and *can only be claimed by prescription;* so that it *cannot* be pleaded by way of *custom.* Thus where a person alleged a custom, that every inhabitant of a certain town had common of pasture in a particular place; it was resolved that such custom was against law, and therefore void. (*c*)

5. Common appendant is *regularly annexed to arable land only;* yet it may be claimed as appendant to a manor, farm, or carve of land, though it contain pasture, meadow, and wood; for it will be presumed to have all been originally arable; but a prescription to have common appendant to a house, meadow, or pasture is void. (*d*)

6. Common of pasture *may be appendant to a cottage*, for a

(*a*) 1 Inst. 122 a.
(*b*) 2 Inst. 85. 4 Rep. 37 a.
(*c*) 1 Roll. Ab. 396. Gateward's case, 6 Rep. 59.
(*d*) 4 Rep. 37 a.

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we consider the natural advantage which accrues from a thing, we say that such a thing is common; but if we consider the use of it among men as it arises from industry, we call it a thing public if it extends to public use, and therefore a thing may be said to be common by nature, and public by use and industry, and again by a promiscuous intercourse and exercise of a public thing, the terms *public* and *common*, may become convertible, as experience constantly shows." Schultes on Aquatic Rights, p. 62–66.

cottage has at least a curtilage annexed to it; nor is it deemed in law to be a cottage, unless there are four acres of land belonging to it. (*a*)

7. It was resolved by the Court of King's Bench, in a modern case, that the owner of a tenement may have two distinct rights of common for his cattle, upon different wastes, in different manors, under several lords; though it might be otherwise if the different wastes had appeared to have been originally held under the same lord. (*b*)

8. Common appendant *can only be claimed for such cattle as are necessary to tillage;* as horses and oxen to plough the land, and cows and sheep to manure it. (*c*)

*9. Common appendant *may by usage be limited to any certain number of cattle;* but where there is *no such usage,* it is *restrained* to cattle *levant* and *couchant* upon the land, to which the right of common is appendant; and the number of cattle which are allowed to be *levant* and *couchant* shall be ascertained by the number of cattle which can be maintained on the land during the winter. (*d*) [1] *67

10. *Common appurtenant* does not arise from any connection of tenure, but must be *claimed by grant or prescription;* and may be annexed to lands lying in different manors from those in which it is claimed. This species of common, though frequently confounded with common appendant, differs from it in many circumstances. It may be *created by grant,* whereas common appendant can only arise from prescription. It may be claimed as annexed to any kind of land, whereas common appendant can only be claimed on account of ancient arable land. It may be not only for beasts usually commonable, such as horses, oxen, and sheep; but likewise for goats, swine, &c. (*e*) [2]

(*a*) Emerton *v.* Selby, 2 Ld. Raym. 1015.

(*b*) Holinshead *v.* Walton, 7 East, 485. (*c*) 1 Inst. 122 a.

(*d*) 1 Roll. Ab. 397, 398. Bennet *v.* Reeve, 4 Vin. Ab. 583. Willes, R. 227. Benson *v.* Chester, 8 Term R. 396. 1 B. & Ald. 709. (Scholes *v.* Hargreaves, 5 T. R. 46. 2 Dane, Abr. 611, § 12.)

(*e*) 1 Roll. Ab. 399. 3 B. & Cr. 339. 6 East, 214. (11 Johns. 498.)

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[1] A right of common for cattle *levant* and *couchant* upon inclosed land, extends to such cattle as the winter eatage of the land, together with the produce of it during the summer, is capable of maintaining. Whitelock *v.* Hutchinson, 2 M. & Rob. 205, per Parke, B.

[2] [Two tenants in common making partition of the land owned between them,

11. Common appurtenant may be for *cattle without number*, or for a *certain number only;* and may be appurtenant to a manor by prescription, or by grant, made since time of memory; and that as well for a certain number of cattle, as without number: where it is without number, it is restrained to cattle *levant* and *couchant* on the land to which it is annexed. Therefore, if a person claims common by prescription on the land of another, for all manner of commonable cattle, as belonging to a tenement, this is a void prescription; because he does not say that it is for cattle *levant* and *couchant* on the land. (*a*)

12. It has been determined in a modern case, that common for cattle *levant* and *couchant* cannot be claimed by prescription, as appurtenant to a house, without any curtilage or land. And Mr. Justice Buller said, the only question was, what was meant in former cases by the words *messuage* and *cottage*, annexed to which was the right of common claimed; for in all of them, the Court said, they would intend that land was included therein. And that it was necessary there should be some land annexed to the house was clear, from considering what was meant by *levancy* and *couchancy;* it meant the possession of such land as would keep the cattle claimed to be commoned, during the 68* * winter; and as many as the land would maintain during the winter, so many should be said to be *levant* and *couchant.* (*b*)

13. Persons entitled to common appendant or appurtenant, cannot in general use the common but with *their own cattle.* If, however, they take the cattle of a stranger, and keep them on their own land, being there *levant* and *couchant*, they may use

(*a*) Fitz. N. B. 180, n. (Cowlan *v.* Slack, 15 East, 108.) 1 Roll. Ab. 398. Stevens *v.* Austin, 2 Mod. 185.

(*b*) Scholes *v.* Hargreaves, 5 Term R. 46. (And see Bunn *v.* Channen, 5 Taunt. 244.)

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the one granted to the other "free liberty of carrying away gravel and sea-weed off the beach belonging to his part of said farm, and also stones below high-water mark, and liberty to tip the sea-weed on the bank of his part of said farm." It was held that this grant created a right of common appurtenant to the land of the grantee, and that said right was a right in common with the grantor, and restricted to the sea-weed and stone the grantee might have occasion to use on the land set off to him, and that, as incident to the right of common, a right of way passed to and from the land and shore; and that both the right of common and the right of way would pass under the general term of appurtenances, upon a conveyance of the land to which they were attached. Hall *v.* Lawrence, 2 R. I. 218.]

the common with such cattle; for they have a special property in them. (*a*)

14. Common appendant or appurtenant for *all* beasts *levant* and *couchant cannot be granted over;* but common appurtenant for a *limited* number of beasts *may be granted over;* and it is said, that in a case of this kind, the commoner may grant over part of the right of common, and reserve the rest to himself. (*b*)

15. *Common because of vicinage* is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. This species of common is in fact *only a permissive right*, intended to excuse what in strictness is a trespass in both; and to prevent a multiplicity of suits. It can only exist between two townships or manors *adjoining* one another; not where there is intermediate land. (*c*) [1]

16. Common because of vicinage is not common appendant; but inasmuch as it *ought to be by prescription*, from time immemorial, as common appendant, it is in this respect similar to that species of common. (*d*)

17. This right of common does not authorize an inhabitant of one township or manor to put his cattle upon the wastes of the other township or manor; but he must put them upon the wastes of his own township or manor, from whence they may escape into the wastes of the other. (*e*)

18. Common because of vicinage *can only be used by cattle levant* and *couchant* upon the lands to which such right of common is annexed; and if the commons of the towns of A and B are adjoining, and there are fifty acres of common in the town of A, and one hundred acres in the town of B, the inhabitants of the town of A cannot put more cattle on their common than it

(*a*) 1 Roll. 398. (*b*) Drury *v.* Kent, Cro. Jac. 15. W. Jones, 375.
(*c*) 1 Inst. 122 a. 11 Mod. 72. (*d*) 4 Rep. 38 a. (*e*) 1 Inst. 122 a.

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[1] [Smith *v.* Floyd, 18 Barb. Sup. Ct. 523.] Common because of *vicinage* cannot be claimed as matter of customary right, by the owner of a farm, against the owner of the adjoining farm, though there is no fence or inclosure between them. Such a right could only have its origin in a grant or in manorial custom. Jones *v.* Robin, 15 Law Journ. N. S. 15. And see Clark *v.* Tinker, 10 Jur. 263.

will feed, without any respect to the extent of the common in the town of B, *nec è converso.* (*a*)

69* *19. *Common in gross* is a right which must be claimed by deed, or prescription, and has no relation to land, but is *annexed to a man's person;* this may be either for a certain or an indefinite number of cattle. And where a person has common of this kind, either for a certain or an indefinite number of cattle he may put in the cattle of a stranger, and use the common with them (*b*) [1]

20. Neither common appendant, nor common appurtenant for cattle *levant* and *couchant*, can be turned into common in gross; but common appurtenant for a limited number of cattle, may be granted over; and by such grant becomes common in gross. (*c*)

21. In many cases the right to common of pasture is confined to a *particular part of the year only;* as from Michaelmas to Lady-day; in which case it is called a *stinted common.* So a person may have a right of common in a meadow, after the hay is carried, till Candlemas; or to common in a pasture, from the feast of St. Augustin till All Saints. (*d*)

22. In a case where a man prescribed to have common appendant, namely, if the land was sown by consent of the commoner, then he was to have no common till the corn was cut, and then to have common again till the land was sown by the like consent of the commoner; it was objected that this prescription was against common right, for it was to prevent a man from sowing his own land, without the leave of another. The whole Court held the prescription good; for the owner of the land could not plough and sow it, where another had the benefit of the common; but in this case both parties had a benefit, for each of them had a qualified interest in the land. (*e*) †

(*a*) Corbet's case, 7 Rep. 5. (*b*) 1 Inst. 122 a. 1 Roll. Ab. 401, 402.
(*c*) Idem. (Bunn *v.* Channen, 5 Taunt. 244.) (*d*) 1 Roll. Ab. 397.
(*e*) Hawks *v.* Mollineux, 1 Leon, 73.

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[1] Common in gross and without number cannot be aliened so as to give the entire right to several persons to be enjoyed by each in severalty. And where such right comes to several persons by operation of law, as by descent, it is incapable of division among them, and must be enjoyed jointly. Leyman *v.* Abeel, 16 Johns. 30.

† [By the statute 13 Geo. 3, c. 81, ss. 16, 17, 18, it is enacted, that assessments may be made for the improvement of such commons; that the time of opening and shutting them may be varied by the major part, in number and value, of the owners and occupiers,

23. Common of estovers is a right of taking necessary housebote, ploughbote, and hedgebote, in another person's woods or hedges, without waiting for any assignment thereof.

24. We have seen that every tenant for life or years has a liberty * of this kind, of common right, in the lands *70 which he holds for these estates, without any express provision of the parties; but this right may also be appendant or appurtenant to a messuage or dwelling-house, by prescription or grant, to be exercised in lands not occupied by the tenant of the house: as if a man grants estovers to another, for the repair of a certain house; they become appurtenant to that house; so that whoever afterwards acquires it, shall have such common of estovers. (*a*)

25. A person prescribed to have estovers for repairing houses, or for *building new houses* on the land. It was alleged, that the custom was unreasonable, to take estovers for the building of new houses; but all the Court, except Williams, held it to be a good prescription; for one might grant such estovers at that day. Williams held the prescription bad, as it ought only to be for repair of ancient houses. (*b*)

26. Where a person has common of estovers in a certain wood of another, by view and delivery of the owner's bailiff; if he takes estovers without such view and delivery, he is a trespasser, though he takes less than he was entitled to. (*c*)

27. Where a person has common of estovers, either by grant or prescription, annexed to his house; though he should *alter the rooms* or chambers, or build *new chimneys* or *add to the house*, the prescription will continue; but he cannot employ any of the estovers in the parts newly added. (*d*)

28. If a person has common of estovers, and the owner of the soil cuts down part of the wood, the person entitled to estovers cannot take any part of the timber thus cut down, but must take his estovers out of the residue. (*e*)

29. Where a person has common of estovers appurtenant to a

(*a*) Tit. 3 & 8. (*b*) Arundel *v.* Steere, Cro. Jac. 25.
(*c*) 5 Rep. 25 a. (*d*) 4 Rep. 87 a. (*e*) Cro. Eliz. 820. Cro. Jac. 256.

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with the consent of the lord or lady of the manor; and that commons which were formerly open during the whole year may be shut and unstocked for a time, reserving a portion for such of the commoners as may dissent.]

house, and he grants the estovers to another, reserving the house to himself; or grants the house to another, reserving the estovers to himself; in either of those cases, the *estovers shall not be severed from the house*, because they must be spent on the house. (*a*)

30. *Common of turbary* is a right to dig turf upon another's land, or upon the lord's waste. This kind of common can *only be appendant to a house*, not to land; for the turfs are to be burned in the house; nor can it extend to a right to dig turf for sale.

71* *31. In an action of trespass, *quare clausum fregit, et solum fodit*, the defendant justified that he and his ancestors, and all those whose estate he had in a certain cottage, had used to have common of turbary to dig and sell *ad libitum*, as belonging to the said cottage. Adjudged that this was a bad plea, such a right of common being repugnant in itself; for a common appertaining to a house ought to be spent in the house, and not sold abroad. Judgment accordingly. (*b*)

32. In a modern case, a custom was pleaded in the manor of Hampstead for all the customary tenants, having gardens, to dig turf on the waste, for making grass-plots, at all times of the year, and as often, and in such quantity, as occasion required. The Court of King's Bench held that such a custom was bad in law, as being indefinite, uncertain, and destructive of the common. (*c*)

33. Where common of turbary is appurtenant to a house, it will *pass by a grant of such house* with the appurtenances. (*d*)

34. *Common of piscary* is a right to fish in the soil of another; or in a river running through another's land. And Lord Coke says, that this kind of right does not exclude the owner of the soil from fishing. (*e*) [1]

(*a*) Plowd. 381.
(*b*) Valentine *v.* Penny, Noy, 145.
(*c*) Wilson *v.* Willes, 7 East, 121.
(*d*) Solme *v.* Bullock, 3 Lev. 165.
(*e*) 1 Inst. 122 a. (See accordingly, Melvin *v.* Whiting, 7 Pick. 79.) *Vide* tit. 27.

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[1] The right of fishery is appurtenant to the soil, every riparian proprietor having the exclusive right to take the fish found in any waters not navigable within his territorial limits. And if a river not navigable runs contiguously between the lands of two proprietors, each has the exclusive right of fishery on his side, extending generally *ad filum medium aquæ*. 2 Bl. Comm. 39; 12 Mod. 512, per Holt, C. J.; Carter *v.* Murcot, 4 Burr. 2164, per Ld. Mansfield; Smith *v.* Miller, 5 Mason, 191; Adams *v.* Pease, 2 Conn. R. 481; 1 Lomax, Dig. 517. But ownership of the soil is not now held to be essential to

*35. A right to common being an incorporeal hereditament, and collateral to the land, *cannot be devested.* For though a person entitled to a right of common be not in the actual enjoyment of it; yet by *non user* only for a time, he does not cease to have a vested estate or interest therein. (*a*) *72

36. *Common of pasture*, where it is *appendant*, may be *apportioned;* because it is of common right. Therefore, if the commoner *purchases part of the land* in which he has a right of *common, the common shall be apportioned; as if the lord purchases a parcel of the tenancy, the rent shall be apportioned. So if A has common appendant to twenty acres *73

(*a*) 5 Rep. 124 a. Tit. 36, c. 13.

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a several or exclusive fishery; it is competent for him to grant and convey to another the exclusive right or service of fishing in his waters, as well as of pasture in his lands. It will be presumed, however, in the absence of proof to the contrary, that the exclusive right of fishing belongs to the owner of the soil, it being appurtenant thereto. Anon. Loft, R. 364. And see Duke of Somerset *v.* Fogwell, 5 B. & C. 875. Angell on Watercourses, ch. 6, § 2. Parteriche *v.* Mason, 2 Chitty, R. 658. Hargrave's note, (7) to 1 Inst. 122 *a*. This right, being exclusive in its character, is sometimes called a *several* fishery; but to avoid confusion and embarrassment in discriminating between the various piscatory rights, others have chosen to term it *predial* or *territorial* fishery. See Schultes on Aquatic Rights, p. 87. There is no little confusion in the books, in regard to the proper application of the terms *free fishery*, *common of fishery*, and *several fishery*. But it is generally agreed that rights of fishery are distributable into three classes; namely, *first*, the exclusive right of the owner of the soil, as above stated; *secondly*, the right of one or more persons to fish in the waters of another, conjointly with the owner, which is generally termed a *common of fishery*, *communia piscariæ*; and *thirdly*, the right of fishing in a navigable river or arm of the sea, where the tide ebbs and flows, or *communis piscaria*, which is universal and inalienable. But a private person may, by grant or prescription, have the franchise of an exclusive right of fishing in a portion of such waters. This right will be treated hereafter, in title 27, § 2. Mr. Schultes prefers a division into two classes only; the first consisting of the right which one man enjoys in common with others, whether they be few, or many, or the entire community; and the second being the right which is his own, exclusive of all others, which he terms a *several fishery*, or a *fishery in gross*. This division is strictly accurate; but perhaps less convenient in practice than the one above mentioned. See Schultes on Aquatic Rights, p. 60; 2 Bl. Comm. 39; Angell on Watercourses, ch. vi. 3 Kent, Comm. 409—418, and cases there cited. Hargrave's note 181, to 1 Inst. 122, *a*. See further, as to common fishery, *post*, tit. 27, § 2, note.

[The common right of fishing is subordinate to the right of navigation, and the right of common fishery includes the right to fish and dredge for oysters and to dig clams. Moulton *v.* Libbey, 37 Maine, (2 Heath,) 472; Parker *v.* Cutler Mill Dam Co., 20 Maine, (7 Shepl.) 357; Weston *v.* Sampson, 8 Cush. 347; Commonwealth *v.* Alger, 7 Ib. 53; Locke *v.* Motley, 2 Gray, 265; McFarlin *v.* Essex Co., 10 Cush. 304; Lewis *v.* Keeling, 1 Jones's Law, N. C. 299. See also Dunham *v.* Lamphier, 3 Gray, 268; Chapman *v.* Hoskins, 2 Md. Ch. Decis. 485.]

of land, and enfeoffs B of part thereof, the common will be apportioned; and B shall have common *pro rata*. For in such case no prejudice is done to the tenant of the land wherein the common is to be had; as he will not be charged with more, upon the whole, than he was before the severance. (*a*)

37. In the case of common *appurtenant*, if the person entitled to it *purchases* part of the land, wherein the common is to be had, there shall be *no apportionment;* because common appurtenant is against common right. But this kind of common shall be *apportioned by alienation of part of the land* to which it is appurtenant. (*b*) [1]

38. One Wild being seised of a messuage and forty acres of land at Croydon, to which a right of common of pasture was appurtenant, on two hundred acres of land at Norwood, for all commonable cattle *levant* and *couchant* on the said messuage and forty acres of land; enfeoffed John Wood of five acres thereof. The question was, whether Wood was entitled to common appurtenant to his five acres. It was resolved that he was; and that the alienation of part of the land should not destroy the right of common, either of the alienor or alienee; but each should retain a right of common proportioned to his estate. (*c*)

39. It was held in the same case, that if a person having a right of common appurtenant to his land, leases part of it, the lessee shall have common for beasts *levant* and *couchant* on the land.

40. Common of *estovers* or *piscary*, *cannot be apportioned;* and

(*a*) Tyrringham's case, 4 Rep. 36. Tit. 28, c. 3.
(*b*) 1 Inst. 122 a. 4 Rep. 37, a.
(*c*) Wild's case, 8 Rep. 78.

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[1] The principle, on which it is held that common shall be extinct, by the alienation of part of the land entitled to common, or by the purchase of the lands in which common is to be taken, is this, that injustice shall not be done to the owners of land subject to the common. Hence it is that the land which gives a right of common to the owner cannot be so alienated as to increase the charge or burden on the land out of which the common is to be taken; and that, when the right is extinguished or gone, as to a portion of the land entitled to common, it is extinct as to the whole; for in such case, common appurtenant cannot be extinct in part, and be *in esse* for part, by the act of the parties. Therefore, where the owner of a right of common appurtenant purchased part of the land out of which the common was to be taken, it was held that his right of common was extinct as to the whole. Livingston *v.* Ten Broeck, 16 Johns. 14, 26; Van Rensselaer *v.* Radcliff, 10 Wend. 653. [See also Hall *v.* Lawrence, 2 R. I. 218.]

Lord Coke says, if a person has housebote, haybote, &c., appendant to his freehold, they are so entire, that they shall not be divided. (*a*) [1]

41. With respect to the *several rights* of the lord or *owner* of the soil, and the *commoners*, it has been long settled that the lord of the manor, or other *owner* of the soil, in which there is a right of common, has the freehold and inheritance in him, and *may exercise every act of ownership* not destructive of the commoner's rights. Therefore, if a person claims by prescription any manner of common in another's land, and that the owner shall be excluded from having pasture, estovers, or the like *therein, this is a prescription against law, as con- *74
trary to the nature of common; it being implied in the first grant, that the owner of the soil should take his reasonable profit there. But a person may prescribe or allege a custom to have and enjoy *solam vesturam*, from such a day to such a day, whereby the owner of the soil shall be excluded from pasturing his cattle there at that time. (*b*)

42. In a case which arose in 23 Cha. II. it was resolved, that the copyholders of a manor may have the sole and several pasture, for the whole year, in the lord's soil; as belonging to their customary tenements; for this does not exclude the lord from all the profits of the land, as he is entitled to the mines, quarries, and trees. (*c*)

43. The lord by prescription may agist the cattle of a stranger on the common; but not otherwise. And in 27 Cha. II. it ap-

(*a*) 1 Inst. 164 a. (*b*) 1 Inst. 122 a. 2 Roll. Ab. 267.
(*c*) Hoskins *v.* Robins, 2 Saund. 324. *Vide* 1 Saund. 358, n. 2.

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[1] Where a farm, entitled to estovers, is divided *by the act of the party* among several tenants, as the right can no longer be enjoyed by any one of them, it is necessarily extinguished. But where such right is devolved on several *by operation of law*, as, by descent, though they cannot enjoy it in severalty, yet they may unite in a conveyance vesting the right in one individual. Van Rensselaer *v.* Radcliff, 10 Wend. 639. And see Leyman *v.* Abeel, 16 Johns. 30; 3 Kent, Comm. 408, 409.

[The right to common of estovers is extinguished by a severance by act of the parties. And where the land to which common of estovers is appurtenant, is divided between the tenants without any provision as to the common of estovers, the right is extinguished as to both tenants. The separate occupation, by the tenants of distinct portions of the land for a great number of years, is sufficient to raise the presumption of a division of the land and of the right to estovers. Livingston *v.* Ketcham, 1 Barb. Sup. Ct. 592.]

pears to have been held, that a license from the lord to a stranger, to put his cattle upon the common, was good; provided there was sufficient common left for the commoners. (*a*)

44. On an application to the Court of Chancery, by the tenants of a manor, for an injunction against the lessee of a manor, to stay his digging of brick earth, and making bricks on the common, Lord King, assisted by Sir Joseph Jekyll, denied the motion; for that the lord was of common right entitled to the soil of the waste; and the tenants had only a right to take the herbage by the mouths of their cattle; that the lord had a right to open mines in the waste of a manor, and why not to dig brick earth; especially where the bricks were made for one of the tenants of the manor, and to be employed in building upon the manor. (*b*)

45. A lord of the manor may dig clay-pits on the common, or empower others to do so, without leaving sufficient herbage for the commoners, if such a right has always been exercised by the lord.

46. A commoner brought an action against the lessees of a lord, for digging clay upon the common. It appeared that the herbage of the common was in many places destroyed by this practice; but it also appeared that clay had been dug by the lord on the common for seventy years preceding; and had been sold by him during that time. The jury found a verdict 75* for the plaintiff; but a new trial was *granted. Lord Kenyon said, the only question was, whether the evidence supported the verdict for the plaintiff; and he was clearly of opinion that it did not. It appeared that a few acres of the common had been rendered unproductive to the commoner; but the right of digging for clay in the common was incontestably proved to have existed at all times in the lord; and no witness had stated in what respect this right had been more exercised latterly than formerly. That such a right, as the lord has here exercised, might exist in point of law, could not be doubted; for if the lord had always dug on the common, and taken what clay he pleased, without interruption or complaint; and nothing appeared to show that this right was limited to any particular extent; there was no pretence for subjecting him, or those who claimed under

(*a*) Smith *v.* Feverell, 2 Mod. 6.

(*b*) ——— *v.* Palmer, 5 Vin. Ab. 7.

him, to such an action; though the commoners had been abridged of their enjoyment of some part of the common. (*a*)

47. It is laid down by Mr. Justice Buller, in the above case, that where there are two distinct rights, claimed by different parties, which encroach on each other, in the enjoyment of them; the question is, which of the two rights is subservient to the other. It may be either the lord's right, which is subservient to the commoners'; or the commoners' which is subservient to the lords. *In general, the lord's is the superior right*, because the property of the soil is in him; but if the custom show that it is subservient to the commoners, then he cannot use the common beyond that extent. (*b*)

48. With respect to the *rights of commoners*, it is settled, that in the case of common of pasture they have nothing to do with the soil, but only a *right to take the grass* with the mouths of their cattle. It has, therefore, been held, that a commoner cannot make a trench or ditch on the common, to let off the water, unless he is authorized by a custom. (*c*)[1]

49. Rabbits being considered as beasts of warren, a commoner cannot justify the killing or driving them away, because they are not vermin; and therefore the keeping of them by the owner of the soil is lawful. If the lord makes rabbit-burrows in the common, and stores them with rabbits, the commoners cannot justify killing them; for a commoner has nothing to do with the land, but to put in his cattle; and he may not meddle with any thing of the lord's there. Nor can a commoner fill up rabbit-burrows *made by the lord in the common; the commoner, may, however, have an action on the case, if the lord leaves not sufficient common; and if the commoner's rights are injured by the making of rabbit-burrows, his remedy is by action. (*d*) *76

(*a*) Bateson *v.* Green, 5 Term R. 411. See also Place *v.* Jackson, 4 Dow. & Ry. 318. (Clarkson *v.* Woodhouse, 5 T. R. 412, n.)

(*b*) 5 Term R. 416. (*c*) 1 Roll. Ab. 406.

(*d*) Bellew *v.* Langdon, Cro. Eliz. 876. Hadesden *v.* Gryssell, Cro. Jac. 195. Cooper *v.* Marhall, 1 Burr. 259. (2 Kenyon, R. 1. 1 Wils. 51.) 2 Leon. 201, 203. Yelv. 104.

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[1] Trespass will lie by one commoner against another, and against his licensee, for making holes in the common, and digging and carrying away turves therefrom, when these acts are not done in the exercise of a right of common. Wilkinson *v.* Haygarth, 11 Jur. 104. [One commoner may sue separately for a disturbance of his right of common. Kenyon *v.* Nichols, 1 R. Isl. 106.]

50. It has been held, in a modern case, that if the lord of the manor *plants trees* on his common, a commoner has no right to abate them. (*a*)

51. It is said by Lord Mansfield, that the lord, by his grant of common, gives every thing *incident to the enjoyment of it*, as ingress, egress, &c.; and thereby authorizes the commoner to *remove every obstruction to his cattle's grazing the grass* which grows upon such a spot of ground; because every such obstruction is directly contrary to the terms of the grant. A hedge, a gate, or a wall, to keep the commoner's cattle out, is therefore inconsistent with a grant, which gives them a right to enter. (*b*)

52. In all instances of this kind, the commoner has a *right to abate;* and in a case where the lord brought an action of trespass, for pulling down hedges, the defendant pleaded that he had a right of common in the place where, &c., and that the hedges were made upon his common, so that he could not enjoy it as fully as before. The Court was of opinion that the defendant might abate the hedges; for thereby he did not meddle with the soil, but only pulled down the erection. (*c*) [1]

53. By the common law, the lord of a manor could not appropriate to himself, by inclosure or otherwise, any part of his wastes, in which his tenants enjoyed a right of common; because the common issued out of the whole and every part thereof. This inconvenience produced an article in the *Statute of Merton*, 20 Hen. III. c. 4, by which it was enacted that when any of the tenants of a manor brought an assise of *novel disseisin* for their common of pasture, and it was therein recognized by the justices that they had as much pasture as sufficed to their tenements, together with free egress and regress from their tenements unto the pasture, they should be contented therewith; and they of whom it was complained should go quit of as much as they had made their profit of their lands, wastes, woods, and pastures. If they alleged that they had not sufficient pasture, or sufficient

(*a*) Kirby *v.* Sadgrove, 1 Bos. & Pul. 13. (8 Anstr. 892. 6 T. R. 483.)
(*b*) 1 Burr. 265. 1 M'Cle. & Yo. 373. (*c*) Mason *v.* Cæsar, 2 Mod. 66.

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[1] A commoner may pull down a house, wrongfully erected on the common, if necessary for the enjoyment of his right, unless persons are in it at the time. Perry *v.* Fitzhowe, 10 Jur. 799. [Davies *v.* Williams, 5 Eng. Law & Eq. Rep. 269.]

ingress and egress, according to their hold, the truth thereof was to be inquired into by the assise; if it was found as alleged, they *were to recover their seisin by view of the in- *77
quest, and the disseisors were to be amerced as in other cases. (*a*)

54. This statute *extended only to common appendant;* but by the *Statute of Westminster* 2, c. 46, it was enacted that the Statute of Merton should bind neighbors, and such as claimed *common of pasture, appurtenant* to their tenements; but not such as claimed common by special grant or feoffment for a certain number, or otherwise. And Lord Coke observes that the word *vicinus* in this act is taken for a neighbor, though he dwell in another town, so as the towns and commons be adjoining to each other. And if the lord has common in the tenant's ground, the tenant may approve within this act, for there the lord is *vicinus.* (*b*) [1]

55. The statute of *Westminster* 2, also provides that, by occasion *of windmills, sheepcotes, dairies, enlarging of a court, necessary curtilage,* none shall be aggrieved by assise of *novel disseisin* for common of pasture. And Lord Coke says, there were five kinds of improvement expressed, that, both between lord and tenant, and neighbor and neighbor, may be done without leaving sufficient common to them that have it; any thing either herein or in the Statute of Merton to the contrary notwithstanding. And *these five are put but for examples;* for the lord may erect *a house* for the *dwelling of a beast-keeper;* and yet it is not within the letter of the law. (*c*)

56. Lord Coke also observes on the words *necessary curtilage*

(*a*) 2 Inst. 85. (*b*) Id. 473, 474. (*c*) 2 Inst. 476.

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[1] The principle of these statutes has been adopted in this country. Accordingly, it has been held, that the owner of a manor, having granted leases conferring rights of common, may appropriate portions of the waste lands, so that enough be left for the tenants; but it must be done in good faith, and for actual use; mere fencing only not being a sufficient appropriation. Van Rensselaer *v.* Radcliff, 10 Wend. 639.

Where one leased lands, reserving thereout a rent, which the lessee covenanted to pay; and the lessor covenanted that the lessee should have common of estovers and of pasture in other lands; which other lands the lessor afterwards appropriated, so that the commons could not be enjoyed; it was held, in an action of covenant for the rent, that the covenant of the lessor did not operate as a grant of the commons, but only as a covenant; and consequently that the lessor's approval of the land furnished no defence to the action for the rent. Watts *v.* Coffin, 11 Johns. 495.

that they shall not be taken according to the quantity of freehold the lord has there, but according to his person, estate, or degree, and for his necessary dwelling and abode; for if he have no freehold in that town, but his house only, yet may he make a necessary enlargement of his curtilage. (*a*)

57. In a subsequent case it was held that the lord cannot by the statute of *Merton* erect a house, unless it be for *his own habitation* or that of *his shepherd;* and he must allege that he built it for one of these purposes; otherwise he might build a great house to let to a nobleman, which might require a greater curtilage than the lord's or his herdsman's. (*b*)

58. The words of the statute of *Merton* are, *pastura et communia pasturæ;* so that it does not extend to common of *turbary, estovers, piscary,* or the like. And in a modern case it was held that the lord of a manor has no right, under the statute
78* of * Merton, to inclose and approve the wastes of a manor, where the tenants have a right to dig gravel on the waste, or to take estovers there. (*c*)

59. By the statute 3 & 4 Ed. VI. c. 3, the statutes of Merton and Westminster are confirmed; and it is further enacted that where judgment is given for the plaintiffs, in an assise, upon any branch of these statutes, the Court shall award treble damages.

60. It was formerly doubted whether, in the case of a common appurtenant without number, the lord might approve, for not being admeasurable it was not approvable, because the common being without number, sufficiency could not be proved. Dyer and Manhood held, that *although* the common were *without number*, yet it *might be reduced to a certainty*, being by *prescription;* as the number of cattle which the best and most substantial tenant of the said tenement, at any time within the memory of man, had kept upon the waste; and then the lord might approve, leaving sufficient common according to such rate. (*d*)

61. In the case of *common because of vicinage*, one *may inclose* against the other; and in 27 Eliz. it was resolved, where two lords of two several manors, had two wastes adjoining parcels of

(*a*) 2 Inst. 476. (*b*) Nevell *v.* Hamerton, Sid. 79.
(*c*) 2 Inst. 87. Grant *v.* Gunner, 1 Taunt. 485. Duberley *v.* Page, 2 Term R. 391.
(*d*) Anon. 4 Leon. 41.

their manors, without inclosure, but the bounds of each were well known, in which wastes the tenants of each manor had reciprocally common because of vicinage, that one might inclose against the other. (*a*)

62. It is laid down by Lord Chief Justice Willes, and the other Judges of the Court of Common Pleas, that although a lord of a manor cannot, by virtue of the statute of Merton, inclose and improve against common of turbary; yet that where there is *common of pasture* and *common of turbary* in the *same waste*, the common of turbary will not hinder the lord from inclosing against the common of pasture; for they are two distinct rights. (*b*)

63. Although the custom of a manor authorizes the commoners to inclose a part of the waste, under certain circumstances, yet this does not take away the lord's right of approving, under the statute of Merton; *provided*, he leaves sufficient common for the tenants. (*c*)

*64. In a modern case, the Court of King's Bench held *79
that a *custom* authorizing the *owners* of ancient messuages within a manor, to have *certain portions* of the common called "moss dales" *assigned to them in severalty*, for digging turves, and after clearing them of turves, to approve them and hold them in severalty, discharged from all right of common, was *good in law*. (*d*)

65. In another modern case it was held by the same Court, that the lord may, with the consent of the homage, grant part of the soil of the common for building, if such a right has been immemorially exercised. (*e*)

66. Where *commoners* have *some other right* on the common beside that of pasture, as of digging sand, &c., the lord may notwithstanding *approve*, if he leave *sufficient common of pasture*; and if such inclosure be no interruption to the enjoyment of the other kind of common. It was, however, laid down in a modern case, that there can be no approver in derogation of a right of common of turbary. (*f*)

(*a*) 1 Inst. 122 a. Smith *v.* How, 4 Rep. 38 b.
(*b*) Fawcet *v.* Strickland, Com. Rep. 577. 6 Term R. 747. 1 Taunt. 485.
(*c*) 2 Term Rep. 391, 392, n.
(*d*) Clarkson *v.* Woodhouse, 5 Term R. 412, n.
(*e*) Folkard *v.* Hemmett, 5 Term R. 417, n.
(*f*) Shakespear *v.* Peppin, 6 Term R. 741. Grant *v.* Gunner, 1 Taunt. 485.

67. Although the statutes of Merton and Westminster speak of the lords of manors, as the only persons enabled to approve of commons, yet it has been held, in a modern case, that *any person who is seised in fee of a waste* within a manor, *may approve, leaving a sufficiency of common;* for otherwise not half the wastes in the kingdom could be approved; as many of the places that are called manors would not be found such in point of law, if the matter were strictly examined. And Lord Kenyon observed, that though in the statutes of Merton and Westminster 2, only the lord is mentioned, yet in those days there was a paucity of expression in acts of parliament; for the lord of the manor is put as the owner of the soil, where they stand in the same predicament. And a contrary decision would be ruinous indeed, and extremely prejudicial to the public. (*a*)

68. The Court of Chancery will assist and protect a lord of a manor in approving a common under the statute of Merton.

69. There having been an inclosure made out of a common, with young wood and timber growing thereon, and the plaintiff insisting that it was an improvement within the statutes of Merton and Westminster 2, the Court thought fit to continue an injunction which had been granted to him, and directed a
80 * trial * to be had next assizes, whether sufficient common was left for the tenants. (*b*)

70. The lord of a manor having inclosed part of a common, and the tenants by force throwing open the inclosures, brought his bill to quiet him in possession; surmising he had only improved according to the statute of Merton, and had left a sufficiency of common; but that some of the defendants, although they pretended to have a right, were not entitled to inter-common upon the waste in question. Upon the hearing, two issues were directed to be tried at law:—1. As to some of the defendants, whether they had a right of common. 2. Whether there was sufficient common left, beyond what was inclosed. But the injunction was continued in the mean time, although it was a new inclosure, and made not above two years before the bill exhibited. (*c*)

71. Upon a bill brought in Chancery by the tenants of a

(*a*) Glover *v.* Lane, 3 Term R. 445. (*b*) Weeks *v.* Staker, 2 Vern. 301.
(*c*) Arthington *v.* Fawkes, 2 Vern. 356. 1 Y. & Jer. 159.

manor, against the lessee of the lord, to establish their right of common of pasture, and for an injunction against the defendant, for inclosing part of the common, Lord King, assisted by Sir Joseph Jekyll, denied the motion; for, by the statute of Merton, the lord might inclose part of the waste, leaving sufficient common. At common law, in an action brought against the lord, the tenant must allege in the declaration, that there is not sufficient common left, or he cannot maintain the action; and if that should be the case, the tenants might have their remedy at common law; and it was too soon for an injunction, before answer. (*a*)

*72. A right to common *may be extinguished*, 1. By a *release* of it to the owner of the land; 2. By *unity of possession* of the land; 3. By *severance* of the right of common; and, 4. By *enfranchisement* of a copyhold to which a right of common is annexed. *81

73. Every right of common may be extinguished by a *release* of it *to the owner of the soil* wherein such right is exercisable. And as a right to common is entire throughout the whole of the land subject to it, if the commoner releases any part of the land from his right of common, it will operate as an extinguishment of the right in every other part. (*b*)

74. *Common appendant* and *appurtenant* become extinguished by *unity of possession* of the land, to which the right of common was annexed, with the land in which the common was; for where a person has as high and perdurable estate in the land as in the common, there the common becomes extinct. (*c*)

*75. In trespass for breaking his close in Abney, the defendant pleaded, that long before, &c., one Bradshaw was seised of the place where, &c., in fee; that one Fuljamb was seised in fee of a house and twenty acres of land in Abney aforesaid; that the said Fuljamb, and all those whose estates, &c., had common in the same place where, &c., and the said Fuljamb enfeoffed of the said tenement the said Bradshaw; that afterwards the said Bradshaw let unto the defendant the said house and twenty acres of land, with all commons, profits, and *82

(*a*) ——— *v.* Palmer, 5 Vin. Ab. 7.

(*b*) Rotheram *v.* Green, Cro. Eliz. 593. 5 Vin. Ab. 17.

(*c*) 4 Rep. 38 a. 1 Taunt. 205. Co. Lit. 313 b. (*Ante*, § 37, note 1. 3 Kent, Comm. 407.)

commodities thereto appertaining, or used with the said messuage; and thereby justified putting in his cattle to use the common, &c. Upon demurrer, it was held clearly that this common was extinguished by the unity of possession, and could not be revived again. Gawdy, Just., said it was the same of common appendant. (*a*)

76. Where the abbot of D. was seised of a common out of the abbey of S., as appurtenant to certain lands of the abbey of D.; afterwards both these abbeys were dissolved, and the possessions of both were given to the King, to hold in as ample a manner as the abbots held them. Afterwards, the King granted the lands of one abbey to A, and those of the other abbey to B. It was determined that the words "in as ample a manner, &c.," were to be construed according to law, and no further; and that the unity of possession of the King had extinguished the common. (*b*)

77. To *constitute such an unity of possession* as will extinguish a right of common, the person must have *an estate* in the lands to which the common is annexed, and in those where the right of common exists, *equal in duration*, and *all other circumstances of right.*

78. A right of common was appendant to certain tenements, which were parcel of the abbey of Sarum, in a common that was parcel of the Duchy of Cornwall. Upon the dissolution of the abbey of Sarum, these tenements became vested in King Henry VIII. in fee, in whom the Duchy of Cornwall was then vested, for want of a Duke of Cornwall. Resolved, by Lord Holt and the rest of the Judges, that this was not such an unity of possession as would destroy the right of common, because King Henry VIII. had not as perdurable an estate in the one as in the other; for in the Duchy of Cornwall the King had only a fee determinable on the birth of a Duke of Cornwall, which was a
83* base fee; *but in the tenements in question he had a pure fee simple, indeterminable, *jure coronæ.* (*c*)

79. A parson had common appendant to his parsonage, in the lands of an abbey; afterwards the abbot had the parsonage appropriated to him and his successors. It was held by Wyndham

(*a*) Bradshaw *v.* Eyre, Cro. Eliz. 570.
(*b*) Nelson's case, 3 Leon. 128.
(*c*) The King *v.* Hermitage, Carth. 289.

and Meade *contra* Dyer, that the abbot had not as perdurable an estate in the one as in the other; for the parsonage might be disappropriated, and then the parson would have the common again. (*a*)

80. Where the lord *approves* a part of the waste, and afterwards *one of the commoners purchases the part so approved*, this will *not extinguish* his right of common; because, by the approvement, the land was utterly discharged of common. (*b*)

81. It has been stated, that where a person having common appurtenant, purchases part of the lands, wherein the common is to be had; the whole right of common shall be extinct. It has also been held, that where *a person having common appurtenant, takes a lease of part of the land*, in which he has such right of common, all his common shall be *suspended during the continuance of the lease;* because it was the folly of the commoner to intermeddle with the land, over which he had a right of common. (*c*)

82. *Common appendant* or *appurtenant* for cattle *levant* and *couchant* may also be *extinguished by severance.* As where a person having common of this kind annexed to a messuage or tenement, conveys away the messuage or tenement, *excepting the common*, this will create an extinguishment of the common. (*d*)

83. Where a right of common is annexed to a copyhold estate, and the lord grants the land to the copyholder and his heirs, *cum pertinentiis*, the common is extinguished; because it was annexed to the customary estate, which being destroyed, the right of common is gone. And the words *cum pertinentiis* cannot have the effect of continuing it; because the right of common was not appurtenant to the freehold estate granted by the lord. (*e*)

84. This doctrine does not appear to be allowed in equity; for where the lord of a manor enfranchised a copyhold, with all common thereto belonging or appertaining, afterwards bought in all the copyholds, and then disputed the right of common with the copyholder he had enfranchised, and recovered against

(*a*) Anon. Godb. 4. (*b*) Dyer, 339, pl. 45. (*c*) *Ante*, s. 38. 8 Rep. 79 a.
(*d*) 1 Roll. Ab. 401. 4 Vin. Ab. 594. O. pl. 1.
(*e*) Tit. 10, c. 6. Marsham *v.* Hunter, Cro. Jac. 253. Gilb. Ten. 224.

84* *him, the Court decreed that he should hold and enjoy the same right of common which belonged to the copyhold. (*a*)

85. It is said by Lord Holt, that if a copyholder of one manor has common in the wastes of another manor, an enfranchisement of the copyhold does not extinguish the common; for it is a derivative right which the copyholder has. So if it be taken as appendant to land, enfranchisement will not extinguish it. (*b*)

86. A right of common, which has been *extinguished by unity of possession*, may be *revived by a new grant.*

87. Thus, in the case of Bradshaw *v.* Eyre, the Court held that the words of the lease, "all commons, profits, &c., occupied or used with the said messuage, &c," operated as a grant of a new right of common. For although it was not common in the purchaser's hands, yet it was *quasi* common, used therewith; and though not the same common as was used before, yet it was the like common. (*c*)

88. Where common appurtenant to a messuage was extinguished by unity of possession in the lord's hands, it was held, that a grant by the lord of the messuage, with all common appurtenant, did not pass the common extinct; but that a grant of all commons usually occupied with the said messuage would have passed such common as the first was. (*d*)

89. Where a person had common in gross derived from the abbot of W., which was destroyed by unity of possession in the crown, with the lands in which the common was; and the crown granted the lands to which the common belonged, with the words, *Tot, tanta, talia, libertates, privilegia et franches, &c., quot, &c., aliquis, &c.* Resolved, that being common in gross, it was not revived; for in that case, every person who had any part of those lands should have as great common as the abbot had; and so the common would be infinitely surcharged. But if such common had been appendant or appurtenant, it would have been revived; for no person would have common for more cattle than were proportionable to his land. (*e*)

(*a*) Styant *v.* Staker, 2 Vern. 250. (*b*) 6 Mod. 20. (*c*) *Ante*, s. 75.
(*d*) Sandys *v.* Oliff, Moo. 467. Grymes *v.* Peacock, Bulst. 17. Clements *v.* Lambert, 1 Taunt. 205.
(*e*) Sawyer's case, W. Jones, 285. Worledge *v.* Kingwell, Cro. El. 794.

TITLE XXIV.

WAYS.

BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES, Book II. ch. 3, § 4.
KENT'S COMMENTARIES. Vol. III. Lect. 52, § 2.
HUMPHRY W. WOOLRYCH. A Treatise on the Law of Ways.
COMYN'S DIGEST. Tit. *Chimin.*
DANE'S ABRIDGMENT. Vol. III. ch. 79.
LOMAX'S DIGEST. Tit. XIX.

SECT. 1. *Nature of.*
4. *How claimed.*
14. *How to be used.*
21. *Cannot be devested.*
SECT. 22. *Who are bound to repair.*
23. *How extinguished.*
25. *How revived.*

SECTION 1. A right of way is the *privilege* which an individual, or a particular description of persons, such as the inhabitants of the village of A, or the owners or occupiers of the farm of B, may have, *of going over another person's grounds.*[1] It is *an incorporeal hereditament* of a *real nature;* entirely different from the *king's highway*, which leads *from town to town;* and also from the *common ways*, which lead *from a village into the fields.*

2. There are *three kinds* of ways. *First*, a *footway*, which is

[1] The *right of way* includes the use of the surface, for passing and repassing, with a right to enter upon and prepare it for that use, by levelling, gravelling, ploughing, or paving, according to the nature of the way granted or reserved; and if the width is not specified by the parties, it shall be such as is reasonably necessary and convenient for the purposes for which it is granted. Atkins *v.* Bordman, 2 Met. 467, per Shaw, C. J. The owner of the soil retains all the rights and benefits of ownership, consistent with such easement. Ibid. Perley *v.* Chandler, 6 Mass. 454. And upon the discontinuance of the way, the absolute title of the owner is revived as before. Thus, where land was taken for a public canal, under an act of the legislature declaring that it should vest in the State in fee simple, but after using it for several years, the canal was abandoned and located elsewhere; the land was held to revert to the original owner. The People *v.* White, 14 Law Rep. 177. [S. C. 11 Barb. Sup. Ct. 26. See also Derby *v.* Hall, 2 Gray, 236.]

called *iter, quod est, jus eundi vel ambulandi hominis.* The *second* is a *footway and horseway*, which is called *actus ab agendo.* This is vulgarly called a *pack* and *primeway*, because it is both a footway, and a pack or driftway also. The *third* is *via* or *aditus*, which *contains the other two*, and *also a cartway;* for this is *jus eundi, vehendi, et vehiculum et jumentum ducendi.* This is *twofold;* namely, *regia via*, the king's highway for all men; and *communis strata*, belonging to a city or town, or between neighbors. (*a*)

3. Notwithstanding these distinctions, it seems that *any of the ways here described* which is common to all the king's subjects, whether it lead directly to a market town, or only from town to town, *may properly be called a highway;* and that any such cartway may also be called the king's highway. But a way to a *parish church*, or to the *common fields* of a town, or to a *village*, which *terminates there*, may be called a *private-way;* because it does not belong to all the king's subjects, but only to
86 * * the inhabitants of a particular parish, village, or house.

And Lord Hale says, that whether it be a highway or not, depends much upon reputation. (*b*)

4. A right of way over another person's ground may be *claimed in three ways.*[1] 1. By *prescription* and *immemorial usage;* † as, where the inhabitants of a certain vill have, time

(*a*) 1 Inst. 56 a. (*b*) 1 Vent. 189. 1 Term R. 570.

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[1] These three methods of claiming a right of way may with propriety be reduced to one, namely, the grant or consent of the owner of the land. Prescription is nothing more than conclusive evidence of an original actual grant; and a way of necessity, created by the act of the owner of the land, is an original inherent servitude, incident to the grant, and to which he is conclusively presumed to consent. The distinction in these modes of claim relates to the method of proof, rather than to the foundation of the title. See Nichols *v.* Luce, 24 Pick. 102; Gayetty *v.* Bethune, 14 Mass. 53; 2 Greenl. on Evid. § 657. Mr. Woolrych recognizes two other modes of establishing a title to private ways, namely, custom, and an act of parliament. But these also are referable to the same source above stated. Woolrych on Ways, ch. 2. [An easement in real estate can be created only by deed or prescription, and a parol license, which, if given by deed, would create an easement, is revocable although executed by the licensee. Morse *v.* Copeland, 2 Gray, 302.]

[† By stat. 2 & 3 Will. 4, c. 71, § 2, it is enacted, that rights of way and other easements after uninterrupted enjoyment for twenty years, shall not be defeated by showing only that such right was first enjoyed at any time previous to such period of twenty years; but nevertheless, such claim may be defeated in any other way by which the same was at the time of the passing of the act liable to be defeated; and that where

out of mind, traversed a particular close or field, to get to their parish church.[1] So a person may prescribe for a way from his house, through a certain close, to the church; though he himself has lands next adjoining to his house, through which of necessity he must first pass. For the general prescription shall be applied only to the lands of others. (*a*)

5. It was held in 18 Edw. IV. that a person may have a right of way to go *through a churchyard.* And it was said in that case, that the churchyard of the Charter House was a common way for the inhabitants of London to St. John's. (*b*)

6. A person cannot claim a way over *another's ground*, from one part *thereof* to another; but he may claim a way over another's ground, from one part of *his own ground* to another. (*c*)

7. 2. By *grant;* as where the owner of a piece of land grants to another the liberty of passing over his lands in a particular direction; the grantee thereby acquires a right of way over those lands. (*d*)[2]

(*a*) Tit. 81, c. 1. 9 Barn. & Cres. 933. (Gayetty *v.* Bethune, 14 Mass. 49, 53.) Palm. Rep. 387.
(*b*) Jenk. Cent. 8, Ca. 94.
(*c*) 6 Mod. R. 3. (*Post*, § 10, note.)
(*d*) 7 Barn. & Cres. 257.

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such enjoyment shall have been for forty years, the right thereto shall be indefeasible, unless it shall appear that the same was enjoyed by consent or agreement, expressed by deed or writing.]

[1] A right of way over a close in all directions, where most convenient to the claimant and least prejudicial to the owner of the close, cannot be prescribed for, nor can a non-existing grant of such a way be presumed. Jones *v.* Percival, 5 Pick. 485.

[2] If the right of way granted is defined as to the particular line or track, the grantee has no right to deviate from the designated course, though the way becomes impassable by floods or otherwise; Miller *v.* Bristol, 12 Pick. 550, 553; unless the obstruction was caused by the owner of the land. Farnum *v.* Platt, 8 Pick. 339. And if the way was granted generally, without any particular designation of the course or track, it may become located by usage for a sufficient period of time; after which it cannot be changed by the grantor, without the consent of the grantee. Wynkoop *v.* Burger, 12 Johns. 222. But if changed by the grantor, the consent of the grantee may be inferred from his use of the new way for a like period of time. Ibid.

[The owner of a block of stores and of land adjoining thereto, made a conveyance of a part of the latter, parallel with and at the distance of twenty feet from the former, "together with the right of passing and repassing over the space of twenty feet between the west wall of the store aforesaid and the eastern line of the before granted premises." It was held that these terms were descriptive of the land, in, through, and over which the grantee was entitled to a right of way, but that it did not describe the limits of the way granted; that the grantee was not entitled to a way over the whole twenty feet, but was entitled to a convenient way, within the land so specified, adapted to the convenient use and enjoyment of the land granted, for any useful and proper purpose for which it might be used. Johnson *v.* Kinnicutt, 2 Cush. 153.]

8. It has been determined in a modern case, that where a person granted to another "a free and convenient way, as well a horseway, as a footway, as also for carts, wagons, wains, and other carriages whatsoever, in, through, over, and along a certain slip of land, &c., to carry stone, timber, coal, or other things whatsoever," the grantee had a right to lay a framed wagon way along the slip of land, for the purpose of carrying coals; it being the most convenient way for transporting them; but that the grantee was not justified in making transverse roads across the slip of land. (*a*)

87* *9. It was held in another modern case, that an uninterrupted enjoyment of a right of way for *twenty years* and no evidence that it had been used by leave or favor, or under a mistake, was sufficient to leave to a jury to presume a grant. (*b*) [1]

10. 3. A person may claim a right of way over another's land

(*a*) Senhouse *v.* Christian, 1 Term R. 560.
(*b*) Campbell *v.* Wilson, 3 East, R. 294. Livett *v.* Wilson, 3 Bing. 115.

The long and frequent use of a way over a part of one's own land, as conducive to the useful and convenient occupation of another part, tends to show that it was necessary or beneficial. If, therefore, the latter parcel be granted, with the ways and easements actually used and enjoyed therewith, or with the ways appurtenant thereto, or with other words alluding to a way actually used, parol evidence *aliunde* may be given to prove that a particular way was then in use by the grantor, and then the way may pass, as parcel of the estate conveyed. Atkins *v.* Bordman, 2 Met. 457, 464, 465, per Shaw, C. J. And see United States *v.* Appleton, 1 Sumner, 492. Hazard *v.* Robinson, 3 Mason, 279.

A right of way may be created by *reservation*, by the grantor, in a deed poll. White *v.* Crawford, 10 Mass. 183.

[Where the grantor bounded the granted premises "on a passage-way two rods wide, which is to be laid out between the premises and the land of A," the grantor, "to make and maintain all the fence between the said contemplated passage-way and the premises," he and those under him are estopped to deny the existence of the passage-way. Tufts *v.* Charlestown, 2 Gray, 271. A right of way appurtenant to land, is appurtenant to the whole and every part of it; and if such land be divided and conveyed in separate parcels, a right of way thereby passes to each of the grantees. Underwood *v.* Carney, 1 Cush. 285; Carlin *v.* Paul, 11 Mis. 32.]

[1] In the United States, such adverse enjoyment is now held to be a conclusive presumption, *juris et de jure*, of an original grant. See Tyler *v.* Wilkinson, 4 Mason, R. 402, per Story, J.; Coolidge *v.* Learned, 8 Pick. 504, 508–511, per Wilde, J.; 2 Greenl. on Evid. § 539; 3 Kent, Comm. 441–444, and cases there cited. See, also, Hill *v.* Crosby, 2 Pick. 466; Commonwealth *v.* Low, 3 Pick. 408; Worral *v.* Rhoades, 2 Whart. 427; Turnbull *v.* Rives, 3 McC. 131; Cuthbert *v.* Lawton, Ib. 194; The State *v.* Gregg, 2 Hill, S. Car. R. 387; Jeter *v.* Mann, Ib. 641.

from necessity.[1] As if A grants a piece of land to B, which is surrounded by land belonging to A; a right of way over A's

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[1] The right of way, from necessity, as already has been intimated, is founded in the consent of the parties; which is conclusively presumed by law, in all cases where the way is indispensably essential to the beneficial enjoyment of the estate. Mere convenience, on the one hand, is not sufficient to raise the presumption; nor is an absolute physical necessity requisite, on the other. In the words of Sir James Mansfield, "it would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had." 3 Taunt. 31. See Nichols *v.* Luce, 24 Pick. 102, 104; Brice *v.* Randall, 7 G. & J. 349; Seabrook *v.* King, 1 N. & McC. 140. But necessity alone, without reference to any relations between the respective owners of the land, is not sufficient to create this right. It is not true, said Lord Ellenborough, that whenever a man has not another way, he has a right to go over his neighbor's close. 4 M. & S. 392. The right grows out of the transactions between the owners of the respective closes, in the alienation of the land; the way being regarded by the law as tacitly granted or reserved, as the case may be, whenever from the nature of the case at the time of the conveyance, such a necessity as is above mentioned was created. The way, in that case, is incident to the grant; and to convey or reserve it by express words would be superfluous, being only *expressio eorum quæ tacitè insunt.* Such is the view taken of this subject by the learned Sergeant Williams, in his note (6) to Pomfret *v.* Ricroft, 1 Saund. 323, cited with approbation by Lord Ellenborough, in Bullard *v.* Harrison, 4 M. & S. 393. See also Woolrych on Ways, pp. 20, 21, to the same effect. This, says Chancellor Kent, speaking of the application of this principle to the case of a way for the grantor, over land he has sold, to his remaining land, "would be placing the right upon a reasonable foundation, and one consistent with the general principles of law." 3 Kent, Comm. 424.

The presumption of such a grant of way over the lands of the grantor, to the land conveyed to the grantee, is quite familiar, and is universally conceded. Its application to the case of the grantor himself, who has no way to his remaining land except over the land he has sold, though equally clear in principle, has not always been admitted; but it is now well established by the weight of authority. See Clarke *v.* Cogge, cited in the text; and Packer *v.* Welsted, 2 Sid. 39; Jordan *v.* Atwood, Owen, 121, per Popham, J.; Dutton *v.* Tayler, 2 Lutw. 1487; Nelson's Lutw. 477; S. C. Buckby *v.* Coles, 5 Taunt. 311.

One who has a way of necessity, the precise course of which is not defined, may pass over any part of the land, in the course least prejudicial to the owner, and reasonably convenient to himself. But it is the right and duty of the owner of the land to set out and designate the way, in a convenient place; and if he unreasonably neglects to do it, the other party may select the track for himself. Holmes *v.* Seeley, 19 Wend. 507; Russell *v.* Jackson, 2 Pick. 574; Capers *v.* Wilson, 3 McCord, 170.

Where the way is undefined, but the party has been accustomed to pass by a particular track, which the owner of the land afterwards obstructs; the party may pass over any other part of the land, by a course least prejudicial to the owner. Farnum *v.* Platt, 8 Pick. 339.

If the right of way results from successive levies of executions upon the debtor's land, at different times, the land taken by the creditor, whose levy created the necessity, must be burdened with the easement. Russell *v.* Jackson, *supra;* and see Pernam *v.* Weed, 2 Mass. 203; Taylor *v.* Townsend, 8 Mass. 411.

land passes of necessity to B, for otherwise he could not derive any benefit from his acquisition. And the feoffor shall assign the way where he can best spare it. It is the same though the close aliened be not totally inclosed by the land of the grantor, but partly by the land of a stranger; for the grantee cannot go over the stranger's land. (*a*)[1]

11. In trespass, upon demurrer, the case was, a person sold lands; afterwards the vendee by reason thereof claimed a way over the plaintiff's lands, there being no other convenient way adjoining; and whether this was a lawful claim was the ques-

(*a*) 2 Roll. Ab. 60. 3 Taunt. 24. 5 Taunt. 311. (Gayetty *v.* Bethune, 14 Mass. 49.)

But where land is sold in parcels to several purchasers, at one sale, under an order of Court, for payment of the debts of the deceased owner, the heir or devisee may have a way of necessity to the residue; and this right is not affected by the order in which the parcels were sold, so as to impose the servitude on the parcel last sold, but it exists alike on them all, so far as the interest of the heir or devisee is concerned. Collins *v.* Prentice, 15 Conn. R. 39.

A way of necessity can be created only in the lands owned by the grantor at the time of the conveyance; and it must be either reserved for his benefit, in the lands conveyed by him, or created in other lands of the grantor, for the benefit of the grantee. If, therefore, he owns lands in severalty, over which a way may be had, and is tenant in common of other adjoining lands, these latter can in no case be incumbered with the right of way, the co-tenants of the grantor not being parties to the conveyance, between whom, alone, and on the ground of presumed intention, this right arises. Collins *v.* Prentice, 15 Conn. R. 423.

If, in the levy of an execution on lands, a sufficient space be left for a way to the remaining land of the debtor, no way of necessity is created for him over the land levied on, notwithstanding the amount of money to be expended in making the way left for him passable for carriages; unless the way thus reserved is so inconvenient or impracticable as to be evidence of fraud upon the debtor's rights. Allen *v.* Kincaid, 2 Fairf. 155.

In the case of Holmes *v.* Goring, 2 Bing. 76, it was held that where the necessity for a way had ceased, as, where the grantee could now pass over other lands of his own, which he had subsequently acquired, the right of way, originating in necessity, had also ceased. Against such a conclusion, it was argued that the necessity arose out of the grant itself, and not out of any state of facts subsequent to the grant; and that, therefore, the right of way having become vested, it could not be affected by any subsequent modification of the property. And this reasoning, Mr. Woolrych thinks, it is difficult to resist. See Woolrych on Ways, p. 72, n. But the decisions in the United States have been in accordance with the rule as laid down in Holmes *v.* Goring. See M'Donald *v.* Lindall, 3 Rawle, 492; Collins *v.* Prentice, 15 Conn. R. 39; Smith *v.* Higbee, 12 Verm. R. 113; [New York Life Ins. & F. Co. *v.* Milnor, 1 Barb. Ch. R. 353; Pierce *v.* Selleck, 18 Conn. 321.]

[1] [Kimball *v.* Cocheco R. R. Co., 7 Foster, (N. H.) 448; Snyder *v.* Warford, 11 Mis. 513; but see Trask *v.* Patterson, 29 Maine, (16 Shep.) 499. A right of way of necessity can only arise by grant express or implied. Proctor *v.* Hodgson, 29 Eng. Law & Eq. 453.]

tion. It was resolved, without argument, that the way remained; and that he might well justify the using thereof, because it was a thing of necessity; for otherwise he could not have any profit of his land. (*a*)

12. It was held in the same case, that if a man hath four closes lying together, and sells three of them, reserving the middle close, and has no way thereto but through one of those which he sold, although he did not expressly reserve any right of way, yet he shall have it, as reserved to him by law, (or by inherent and implied reservation or agreement.) (*b*)[1]

13. In a modern case, it was determined by the Court of King's Bench, that where a person conveys land, merely *as a trustee*, to another, to which there is *no access but over the trustee's land*, a *right of way passes of necessity*, as incident to the grant. And Lord Kenyon observed, it was impossible to distinguish this from the general case, where a man grants a close surrounded by his own land, in which case the grantee has a way to it, of necessity, over the land of the grantor; merely on the ground that the plaintiff conveyed to the defendant in the character of a trustee; for it could not be intended that he meant to make a void grant. There being no other way to the defendant's close, but *over the land of one of the persons* who granted to him, he was entitled to such a way of necessity, upon the authority of
*all the cases, and the principle that every deed must be *88
taken most strongly against the grantor. (*c*)

14. A right of way *can only be used according to the grant*, or the occasion from which it arises; and must not exceed it. Therefore, if a person has a right of way over another's close *to* a particular place, he cannot justify going *beyond* that place. (*d*)[2]

(*a*) Clarke *v.* Cogge, Cro. Jac. 170. (*b*) *Vide* 1 Saund. Rep. 323, n. 6.
(*c*) Howton *v.* Frearson, 8 Term R. 50. Reignolds *v.* Edwards, Willes, R. 282.
(*d*) (Woolrych on Ways, p. 34.)

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[1] See Dutton *v.* Tayler, Nelson's Lutw. 477; Buckby *v.* Coles, 5 Taunt. 311; *supra*, note (2.) For the difference between an exception and a reservation, see *post*, tit. 32, ch. 21, § 65, note.

[2] So, where one had a way for purposes of agriculture, it was held that he could not lawfully use it for carting lime. Jackson *v.* Stacey, Holt, N. P. Cas. 455. [See also French *v.* Marston, 4 Foster, (N. H.) 440. A right of way to a warehouse would authorize the tenant to place on the ground goods to be stored in or carried from the warehouse, for a reasonable and convenient length of time to put them in the store, or to remove them from the store; but it would not authorize him to use the ground as a place of deposit for the merchandise. Appleton *v.* Fullerton, 1 Gray, 186.]

15. In trespass for driving cattle over the plaintiff's ground, the case was: A had a way over B's ground to Blackacre, and drove his beasts over B's ground to Blackacre, then to another place beyond Blackacre. Upon demurrer, the question was, whether this was lawful or not. It was urged that, when the defendant's beasts were at Blackacre, he might drive them whither he would. On the other side, it was said that by this means the defendant might purchase one hundred or one thousand acres adjoining to Blackacre, to which he prescribed to have a way, and by that means the plaintiff would lose the benefit of his land; that a prescription presupposed a grant, and ought to be continued according to the intent of its original creation; to which the Court agreed; and judgment was given for the plaintiff. (*a*)

16. The same point appears to have been determined in a subsequent case, in which Powell, Justice, observed that the difference was, where the person having a right of way to a particular place, goes further, to a mill or a bridge, there it may be good; but when he goes to his own close, it is not good. The editor of the fourth edition of Lord Raymond's Reports, in a note upon this passage, expresses a doubt whether this distinction be well founded; and says, "The *true point* to be considered upon such a case should seem to be, *quo animo the party went to the close;* whether really and *bonâ fide* to do business *there*, or merely in his way to some distant place." (*b*)

17. Where a person has a right of way over another's land, and the *road is impassable*, (through the fault of the owner who is bound to repair,) he may go over any other part of the land.

18. In an action of trespass for destroying his close, the defendant pleaded, that time out of mind there was a common footpath through the close, &c. The plaintiff replied that the defendant went in other places, out of the way. The defendant rejoined that the footpath was *adeo luteosa et funderosa,* 89* *by * default of the plaintiff, who ought to amend it;* that he could not pass along; therefore he went as near the path as he could in good and passable way: this was resolved to be a good plea and justification. (*c*)

(*a*) Howell *v.* King, 1 Mod. 190. (Davenport *v.* Lamson, 21 Pick. 72. Senhouse *v.* Christian, 1 T. R. 560. Webster *v.* Bach, Freem. 247.)

(*b*) Lawton *v.* Ward, 1 Ld. Raym. 75.

(*c*) Henn's case, W. Jones, 296.

19. It has, however, been resolved, in a modern case, that where a person has a right to a precise *specific way* over another's ground, *which he is bound to repair*, he *cannot deviate* from it, even though it should be overflowed by a river.

20. In trespass for breaking and entering a close, the defendant pleaded a right of way, by prescription, through a lane of the plaintiff's; that the tenants of the *locus in quo* were bound to repair; that the lane was overflowed with water, and that he necessarily went over the *locus in quo*. The plaintiff having traversed the prescription to repair, and the right of way, the jury found for the plaintiff, as to the first plea, respecting the repairs, and for the defendant, as to the second plea, respecting the right of way.

The question on the validity of the last plea having been argued, Lord Mansfield said: "The question is upon the grant of this way. Now, it is not laid to be a grant of a way generally over the land, but of a precise specific way. The grantor says, you may go in this particular line; but I do not give you a right to go either on the right or left. I entirely agree with my brother Walker, that, by common law, he who has the use of a thing, ought to repair it. The grantor *may* bind himself, but here he has not done it. He has not undertaken to provide against the overflowing of the river; and, for aught that appears, *that* may have happened by the neglect of the defendants. *Highways* are governed by a different principle; they are for the public service; and if the usual tract is impassable, it is for the general good that people should be entitled to pass in another line."

Mr. Justice Buller observed that, if this had been a way of necessity, the question would have required consideration; but it was not so pleaded. It did not appear that the defendant had no other road. (*a*)

21. A *right of way* being an *incorporeal hereditament*, similar, in many respects, to a right of common, *cannot be divested.* (*b*)

22. It seems that by the *common law*, where a person granted a right of way over his land to another, *the grantee was bound* **to repair it.* But *the grantor* of a private way *90

(*a*) Taylor *v.* Whitehead, 2 Doug. 745. (Miller *v.* Bristol, 12 Pick. 550. Farnum *v.* Platt, 8 Pick. 339. Williams *v.* Safford, 7 Barbour, R. 309.) 2 Show. R. 28. *Vide* 1 Saund. R. 322, n. 3.

(*b*) Shep. Touch. 23. (White *v.* Crawford, 10 Mass. 183.)

may be bound to repair it, either *by prescription*, or by an *express stipulation*. (*a*)

23. Where a person has a right of way over another's close, and he purchases the close, his *right of way is extinguished* by the *unity of seisin and possession*, if it be *only an easement*; but if it is of *necessity*, it is *not* extinguished by unity of possession. (*b*) [1]

24. Thus, if a vill has a right of way to a church, and one of the vill purchases the land over which the way is, yet this unity of possession shall not extinguish the way, because it is a thing of necessity. (*c*)

25. It is said that, where a right of way has been *extinguished by unity of possession*, it may be *revived by severance*.

26. Thus, where, upon a descent to two daughters, land, over which there had been a right of way, was allotted to one of them, and the land to which the right of way belonged was allotted to the other; it was held that this allotment, without specialty to have the way anciently used, was sufficient to revive it. (*d*)

27. There is a case similar to this in Brook's Abridgment, where it is doubted whether the partition did not create a new right of way. But this doctrine of revival does not seem to have been admitted in the following case. (*e*)

28. Thomas Adderley being seised at the same time of two closes, over one of which a right of way had been immemorially used to the other, devised the close to which the right of way had been annexed with its appurtenances to A B, and devised

(*a*) Rider *v.* Smith, 3 Term R. 766. (Wynkoop *v.* Burger, 12 Johns. 222. Doane *v.* Badger, 12 Mass. 65.)

(*b*) Heigate *v.* Williams, Noy, Rep. 119. Shury *v.* Piggott, 3 Bulst. 340. 5 Taunt. 311.

(*c*) Jordan *v.* Atwood, 1 Roll. Ab. 936. (Owen, 121, S. C.)

(*d*) Jenk. Cent. 1. Ca. 37. (*e*) Bro. Ab. tit. Extinguishment, pl. 15.

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[1] The distinction in the text is more accurately expressed in the language of Popham, C. J., as reported by Owen. "If the way be a way of *ease or pleasure*, there it shall be extinguished by unity; but if it be a way of necessity, there it is otherwise." Jordan *v.* Atwood, Owen, 121. And see Woolrych on Ways, 71; 3 Kent, Comm. 449; 1 Saund. 323, note (6,) by Williams. [A right of way appurtenant to land over and upon adjoining land, is not extinguished by the vesting of both estates in the same person as mortgagee under separate mortgages, until both mortgages are foreclosed. Ritger *v.* Parker, 8 Cush. 145. The right of way is not extinguished if the owner of the servient estate acquires less than a fee simple in the dominant estate, as an estate for life only. Pearce *v.* McClenaghan, 5 Rich. 178. See also Ferguson *v.* Witsell, Ib. 280.]

the other close to another person. A B claimed the right of way. The Court held that, from the moment when the possession of the two closes was united in one person, all subordinate rights and easements were extinguished. The only point, therefore, that could possibly be made in the case was, that the ancient right, which existed while the possession was distinct, was merely suspended, and might revive again. It was admitted that the word appurtenances would carry an easement, or legal right; but its operation must be confined to an old existing right. And if the right of way had passed in this instance, it must have passed as a new easement; but the right of way being extinct, the word appurtenances had nothing to operate upon. (*a*)

*29. It is said that, though a right of way be extinguished, yet if it is used for thirty years after, this is sufficient to afford a *presumption of a new grant* or license from the owner of the land. (*b*) *91

30. [The words "with all ways, &c., thereto belonging or in any wise appertaining," in a conveyance, will not pass a way not strictly appurtenant, unless the parties appear to have intended to use those words in a sense larger than their ordinary legal sense.] (*c*)

(*a*) Whalley *v.* Thompson, 1 Bos. & Pul. 371.
(*b*) Keymer *v.* Summers, Bull. N. P. 74.
(*c*) Barlow *v.* Rhodes, 1 Cro. & Mee. 439. See 2 B. & C. 96. Bulst. 17. (Atkins *v.* Bordman, 2 Met. 457, 464.)

TITLE XXV.

OFFICES.

BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES. Book II. ch. 3, § 5.
KENT'S COMMENTARIES. Vol. III. Lect. 52, § 3.
COMYN'S DIGEST. Tit. *Officer.*
DANE'S ABRIDGMENT. Vol. III. ch. 75.

SECT. 1. *Nature of.*
4. *How created.*
5. *Offices incident to others.*
6. *How Offices may be granted.*
11. *What Offices may be granted to two Persons.*
14. *What Estate may be had in an Office.*
27. *What Offices may be granted in Reversion.*
31. *Some Offices may be assigned.*
33. *Who may hold Offices.*
SECT. 40. *When exercisable in Person, and when by Deputy.*
46. *Statutes against selling or buying Offices.*
52. *Where Equity will interpose.*
55. *How Offices may be lost.*
56. *By Forfeiture.*
62. *By Acceptance of an incompatible Office.*
65. *By the Destruction of the Principal.*
66. *By Suspension.*
67. *Pay not assignable.*

SECTION 1. An *office* is a *right to exercise a public or private employment, and to take the fees and emoluments* belonging to it; and all offices relating to land, or exercisable within a particular district, are deemed *incorporeal hereditaments*, and classed under the head of Real Property. (*a*) [1]

(*a*) (3 Kent, Comm. 454. Finch, L. 162.)

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[1] The right to exercise an office is as much a species of property as any other thing capable of possession; and the law affords ample redress, as in other cases of wrong, whenever the office is wrongfully withheld, or the party is unjustly deprived of it. Wammack *v.* Halloway, 2 Ala. R. 31; Hoke *v.* Henderson, 4 Dev. Rep. 18, 19. [But an act establishing an officer's salary or compensation, is not a contract within the meaning of the constitution; State *v.* Smedes, 26 Miss. (4 Cushm.) 47. See also Auditor *v.* Adams, 13 B. Mon. 150; Benford *v.* Gibson, 15 Ala. 521; and the legislature of a State may increase or diminish the compensation allowed its public officers without any other restraint than that imposed by its own constitution. Benford *v.* Gibson, *ubi supra.*]

2. Offices are either *public* or *private;* the *first* are those which concern the *general administration of justice* or the *collection of the public revenue.*[1] Such as the judges of the King's Courts at Westminster, sheriffs, coroners, &c., the commissioners of the customs and excise, &c. The *second* are those which only concern *particular districts* belonging to *private individuals*, such as stewards and bailiffs of manors.

3. Officers are also either *judicial* or *ministerial;* the *first* relating to the *administration of justice*, and which must be
* exercised by persons of sufficient skill and experience in * 93

"In the United States," says Chancellor Kent, "no public office can properly be termed an hereditament, or a thing capable of being inherited. The constitution, or the law of the State provides for the extent of the duration of the office, which is never more permanent than during good behavior. Private ministerial offices only can be classed as hereditaments, and I do not know of any such subsisting among us. It would not be consistent with our manners and usages to grant a private trust or employment to one and his heirs in fee; though I do not know of any positive objection to such a contract, in point of law." 3 Kent, Comm. 454.

In The State *v.* Dews, 1 R. M. Charlt. Rep. 397, it was held, upon great consideration that public officers, in this country, were public agents or trustees, and had no proprietary interest or private property in their offices, beyond the constitutional tenure and salary, if any, prescribed; and that official rights and powers, flowing from their offices, might be changed at the discretion of the legislature, during their continuance in office. Ibid.

An officer *de facto*, is one who exercises an office under color of right, by virtue of some appointment or election, or of such acquiescence of the public as will authorize the presumption of at least a colorable appointment or election; being distinguished, on the one hand, from a mere usurper of office, and on the other, from an officer *de jure.* Wilcox *v.* Smith, 5 Wend. 231; Plymouth *v.* Painter, 17 Conn. 585; Burke *v.* Elliott, 4 Ired. 355.

The acts of such an officer are generally valid, as far as concerns the public, or third persons having an interest in them; but not so as to justify or give title to the officer himself. McInstry *v.* Tanner, 9 Johns. 135; 1 Greenl. on Ev. §§ 83, 92, and cases there cited; Fetterman *v.* Hopkins, 5 Watts. 539; Blake *v.* Sturtevant, 12 N. H. 567; Cummings *v.* Clark, 15 Verm. 653.

Proof that a person is reported to be and has acted as a public officer, is *primâ facie* evidence, between third persons, of his official character. McCoy *v.* Curtice, 9 Wend. 17; [Baker *v.* Shepherd, 4 Foster, (N. H.) 208; Smith *v.* State, 19 Conn. 493; Bryan *v.* Walton, 14 Geo. 185. Public officers are entitled to reasonable intendments in their favor, the same that are applied to the proceedings of Courts. Stevens *v.* Kent, 26 Vt. (3 Deane.) 503. Where the record states that a public officer took the oath of office, it imports the oath of office prescribed by law. Scammon *v.* Scammon, 8 Foster, (N. H.) 419; Sheldon *v.* Wright, 7 Barb. Sup. Ct. 39.]

[1] The term "*office*," implies an authority to exercise some portion of the sovereign power, either in making, administering, or executing the laws. 3 Greenl. R. App. p. 481; Bamford *v.* Melvin, 7 Greenl. R. 14.

the duties of such offices.[1] The *second* are those where little more than *attention* and *fidelity* are required to the due discharge of them.

4. All *public offices* must originally have been *created by the sovereign* as the fountain of government. (*a*) [2]

(*a*) 4 Inst. 75.

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[1] A Judge, in granting the writ of *habeas corpus*, in vacation, acts ministerially; but his proceedings, after the prisoner is brought before him, are judicial. Yates *v.* Lansing, 5 Johns. 282, per Kent, C. J.

[2] In the United States, all public offices are enumerated and established either by constitutional provisions or by legislative enactment. In those which are elective, the record of election is the evidence of appointment to the office. In others, the title to the office is created by the act of appointment, of which the commission is evidence only. This subject was profoundly discussed in the great case of Marbury *v.* Madison, 1 Cranch, 137. See also the note of Mr. Justice Story in reply to President Jefferson's objections, in 3 Story on Const. p. 407. And see Jeter *v.* The State, 1 McCord, 233; The State *v.* Lyles, Ibid. 238.

"Another question growing out of appointments, is at what time the appointee is to be deemed in office, whether from the time of his acceptance of the office, or his complying with the preliminary requisitions, (such, as taking the oath of office, giving bond for the faithful discharge of his duties, &c.,) or his actual entry upon the duties of his office. This question may become of great practical importance in cases of removals from office, and also in cases, whereby law officers are appointed for a limited term. It frequently happens that no formal removal from office is made by the President, except by nominating another person to the senate, in place of the person removed, and without any notice to him. In such a case, is the actual incumbent in office *de facto* removed immediately upon the nomination of a new officer? If so, then all his subsequent acts in the office are void though he may have no notice of the nomination, and may, from the delay to give such notice, go on for a month to perform its functions. Is the removal to be deemed complete only when the nomination has been confirmed? Or, when notice is actually given to the incumbent? Or, when the appointee has accepted the office? See Johnson *v.* United States, 5 Mason, R. 425, 438, 439. Hitherto this point does not seem to have received any judicial decision, and therefore must be treated as open to controversy. If the decision should be, that in such cases the nomination without notice creates a removal *de facto*, as well as *de jure*, it is obvious, that the public, as well as private individuals, may become sufferers by unintentional and innocent violations of law. A collector, for instance, may receive duties, may grant clearances to vessels, and may perform other functions of the office for months after such a nomination, without the slightest suspicion of any want of legal authority. Upon one occasion, it was said by the Supreme Court, that 'when a person appointed to any office (under the United States) refuses to accept that office, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.' Marbury *v.* Madison, 1 Cranch, R. 137; S. C. 1 Peters, Cond. R. 270. From this remark it would seem to be the opinion of the Court, that the office is completely filled in every case of vacancy, as soon as the appointment is complete; independently of the acceptance of the appointee. If so, it would seem to follow, that the removal must, at all events, be complete, as soon as a new appointment is made." 3 Story on the Constitution, § 1548. See United States *v.* Kirkpatrick, 4 Wheat. R. 733, 734.

5. There are several *offices incident to other offices* of a superior kind; and grantable by those who hold such superior offices. Thus the Lord Chancellor, or keeper of the great seal, and the Chief Justice of the Courts of King's Bench and Common Pleas, have a right of granting several offices in their respective courts. The sheriffs of counties appoint the county clerk, and the *custos rotulorum* appoints the clerk of the peace. (*a*)

*6. *Ancient offices* must be granted in such form and manner as they have used to be; unless the alteration be by authority of parliament. Offices *held immediately from the Crown*, must be granted by *letters-patent*. Each office must be granted with all its ancient rights and privileges, and every thing incident to it. For if any office incident to that which is granted is reserved, the reservation is void. Thus it is said by Lord Holt, that a grant of the office of marshal of the King's Bench prison, to which the office of chamberlain is inseparably incident, with a reservation of the office of chamberlain, was void. (*b*) *94

7. So where an office is incident to another office, such *incidental office cannot be granted by the crown*, even though the principal office be vacant at the time.

8. Queen Elizabeth, by letters-patent, granted the office of

(*a*) 2 Inst. 425. 4 Rep. 34 a. Jenk. 216. 4 Mod. 167.
(*b*) 4 Inst. 75. 1 Salk. 439. 2 Ld. Raym. 1038.

[See, also, United States at the relation of Goodrich *v.* Guthrie, 17 How. U. S. 284, in which the power of the President to remove a territorial Judge, is argued but not decided. McLean, J., holding that he has no such power.

The constitution of Maryland provides that "the State librarian shall be elected by the joint vote of the two branches of the legislature for two years and until his successor shall be elected and qualified." In January, 1852, A was elected librarian, and in April, 1853, resigned his office, when B was elected, and in March, 1854, the legislature then in session, elected C librarian. Held, that B was entitled to hold his office for two years from the period of his election, and not simply for the unexpired term of A; and that the legislature had a right to anticipate the vacancy which would occur upon the expiration of the two years from the election of B, and before another session of the legislature, by the election of C, who will then be entitled to the office. Marshall *v.* Harwood, 5 Md. 423. In the absence of any legal provision to that effect, an office which is filled by an annual election, does not continue to the person elected until a successor is elected and qualified. Beck *v.* Hanscom, 9 Foster, (N. H.) 213. A county treasurer, elected under the territorial laws of Wisconsin, could hold his office only for the time prescribed therein. The adoption of the constitution did not repeal, qualify or annul any of the territorial laws relating to that office. State *v.* Wyman, 2 Chand. (Wis.) 5. The legislature have the power to shorten the term of office of any officer, though elected by the people, the tenure of whose office is not fixed by the constitution. Taft *v.* Adams, 3 Gray, 126.]

clerk of the county court of Somersetshire to one Mitton, with all fees, &c. Afterwards the Queen constituted Arthur Hopton, Esq. sheriff of the same county, who interrupted Mitton, claiming that which was mentioned to be granted to Mitton to be incident to his office of sheriff; and thereupon appointed a clerk himself of the county court. Mitton complained to the Lords of the Council, who referred the consideration of the validity of the grant of the said office to the two Chief Justices, Wray and Anderson, who held conferences with the other justices; all of whom held that the said letters-patent were void in law, because the office of sheriff was an ancient office of great trust and authority; and the King could not abridge the sheriff of any thing incident or appurtenant to his office, for the office was entire, and so ought to continue; that the county court, and the entering all proceedings in it, were incident to the office of sheriff, and therefore could not by letters-patent be divided from it; and that although the grant was made to Mitton when the office was vacant, yet it was void; and when the Queen appointed a sheriff, he should avoid it. (*a*)

9. As to grants of *incidental offices* by persons holding the superior offices, they must in general be *by deed duly exe-*
95 * *cuted;* *though Lord Coke says a man may be retained as a steward to keep a court baron or a court leet, without deed. And it was held by the Court of King's Bench, in 10 Will. III. that an appointment of a clerk of the peace of a county, by the *custos rotulorum*, by parol, was good; because it enured as an execution of a power; for whatever is to take effect out of a power or authority, or by way of appointment, is good without deed; otherwise where it takes effect out of an interest. (*b*)

10. If a *house or land belong to an office*, by the grant of the office by deed, the house or land will pass as belonging to it. (*c*)

97* *11. *Ministerial offices*, requiring only common skill and diligence, *may be granted to two persons;* and so may also some judicial offices established by act of parliament. But an ancient judicial office cannot be granted to two persons. Thus, King Henry VI. having granted the office of high admiral to the Duke of Exeter and his son, the Judges held it to be void,

(*a*) Mitton's case, 4 Rep. 32 b.

(*b*) 1 Inst. 61 b. Saunders *v.* Owen, 2 Salk. 467. 1 Ld. Raym. 158. 12 Mod. 199. Colles. Parl. Ca. 70.

(*c*) 1 Inst. 49 a.

the charter being of a judicial office; for such ancient offices must be granted as they formerly had been. (*a*)

12. A grant to two persons to be Chief Justices of any of the *courts at Westminister would be void; but as to *98 offices incident to the King's courts at Westminster, it seems to be in the discretion of the Judges, if they see that an office in their courts comprehends too much for one man to execute, to join another person with him. In such a case it must, however, be still granted as one office; for if it is divided into two or three offices, the prescription is interrupted, and it is not a grant of the ancient office. (*b*)

13. If an office be *granted to two*, and *one dies*, it is said that the office does not survive, but determines. As if there are two sheriffs, and one of them dies, the other cannot act; otherwise, if granted to two and the survivor of them. (*c*)

14. Although several of the great offices of state in England are called *offices in fee*, yet the estate in them is not, strictly speaking, an estate in fee simple; for it is only inheritable by the *lineal descendants of the first grantee of the *99 office; not by any collaterals.

15. The offices of sheriff, gaoler, park-keeper, or forester, steward, or bailiff of a manor, have also been granted in fee simple. And it is held, that where an office may be granted in fee, it may be granted for life; or to one for life, remainder to another for life. (*d*)

16. With respect to *judicial offices*, they cannot, in general, be granted for a greater estate than for life; because they are only exercisable by persons of skill and capacity.

17. If an office be granted to a person *quamdiu se bene gesserit*, the grantee has an estate for life. For as nothing but misconduct can determine his interest, no one can prefix a shorter time than his life, since it must be by his own act, which the law will not presume that his estate can determine. If the words be, *quamdiu se bene gesserit tantum*, the estate will not be abridged by the addition of the word *tantum*. (*e*)

18. [And so *e converso* where an office is granted for life, there

(*a*) 4 Inst. 146. 2 Wm. & Mary, st. 2, c. 2. (*b*) 11 Rep. 3 b.
(*c*) Jones *v.* Pugh, 1 Salk. 465.
(*d*) 2 Inst. 882. 9 Rep. 48 b, 97 b. 3 Barn. & Cress. 616.
(*e*) 1 Inst. 42 a. 1 Roll. Ab. 844. Harcourt *v.* Fox, 1 Show. 491.

is an implied condition that it shall continue in the grantee only *quamdiu se bene gesserit.*] (*a*)

19. The Judges of the several courts at Westminster formerly held their offices *durante bene placito.* By the stat. 13 Will. III. c. 2, it was enacted, that their commissions should be *quamdiu se bene gesserint;* but that it should be lawful to remove them on an address of both houses of parliament. Now, by the stat. 1 Geo. III. c. 23, the Judges are continued in their offices during their good behavior, notwithstanding any demise of the Crown; but may be removed on an address of both houses of parliament.

20. Offices which do not concern the administration of justice, and *only require common skill and diligence*, may be *granted for years;* because they may be executed by deputy, without any inconvenience to the public.

21. The office of register of policies of insurance in London was granted by the King for years; and adjudged to be a good grant, because it did not concern the administration of justice, but only required the skill of writing after a copy. (*b*)

22. Offices of this kind may be granted *to one person in trust for another;* and the Court of Chancery will compel the execution of such a trust. (*c*)

100* *23. *No office of trust, requiring skill and capacity* in the execution of it, can however be granted *for years.*

24. King James I. granted the office of marshal of the Marshalsea for thirty-one years. It was held by the Lord Chancellor and four of the Judges, that the grant was void; because this was an office of great trust annexed to the person, and concerned the administration of justice; that this trust being individual and personal, should not be extended to executors or administrators; for the law will not repose confidence, in matters concerning the administration of justice, in persons unknown. (*d*)

25. It was determined in a subsequent case, that the office of marshal of the King's Bench might be granted to a person for years, determinable on the death of such person; for in that case the office could not go to executors or administrators. (*e*)

(*a*) Lit. s. 378. Co. Lit. 233 b. Bartlett *v.* Downes, 3 Barn. & Cress. 619.
(*b*) Vale *v.* Priour, Hard. 351. Jones *v.* Clerk, Hard. 46.
(*c*) Bellamy *v.* Burrow, Forrester, 97.
(*d*) Reynel's case, 9 Rep. 95. (*e*) Sutton's case, 6 Mod. 57.

26. Lord Hale is said to have been of opinion that an office of trust might be granted for years; for that the true reason of the determination in Reynell's case was, that the custom had been to grant it in fee. Lord Chancellor Finch is reported to have said that an office may be granted for years, for the same inconveniences attend an office in fee; and a person unknown and unfit, as an infant or feme covert, may happen to have the same, under an estate of inheritance. (*a*)

27. *Ministerial offices*, and also offices exercisable by deputy, may be granted in reversion, or rather *to commence in futuro;* and to take effect in possession upon the death of the person then holding the office. (*b*)

28. The King granted an office to a person *durante bene placito;* afterwards granted the same office to another person for *life; to commence from the death, surrender, or *101 forfeiture, of the first grantee. It was objected that the second grant was void, for the first estate being at will, could not be surrendered or forfeited; and that an estate of freehold could not depend on an estate at will. (*c*)

The Court said, 1. That an estate at will in lands could not be surrendered, because it was determinable at the will of either party; but an office was not properly at the will of both parties, but at the will of the King only; for the grantee could not determine his will but by surrender .2. It might be said to be forfeitable in some measure, and the King's tenants at will may be said to forfeit; for, in the case of forfeiture, the King would be informed by inquisition, before he determined his will; then upon the return of the inquisition, the office would be forfeited. 3. A freehold estate in lands could not be granted to commence *in futuro*, or depend on an estate at will; but a new office might be created, to commence *in futuro;* for it was the creature of him who made it, and was no otherwise in being than it was in grant. The King did not grant a reversion but *in* reversion; and that not in respect of a particular estate, but because he was pleased to grant *in futuro.*

29. But where there is no custom or usage to warrant it, *a judicial office cannot be granted in reversion.* (*d*)

(*a*) 2 Show. R. 171. (*b*) Howard *v.* Wood, 2 Show. R. 21.
(*c*) Rex *v.* Kemp, 2 Salk. 465. Skin. 446.
(*d*) Walker *v.* Lamb, Cro. Car. 258. 1 Inst. 3 b.

30. King James I. granted the office of Auditor of the Court of Wards to two persons, to hold immediately from the death of the two persons who then held the office. Resolved, that this grant was void, because it was of a judicial office; and as
102* none *can give any judgment of things which may happen *in futuro*, so none can be a Judge *in futuro;* and the rule was, that *officia judicialia non concedantur antequam vacent.* For he, who at the time of the grant in reversion may be able and sufficient to supply the office of judicature, before the office falls, may become unable and insufficient to perform it. (*a*)

103* *31. Where an office is granted to a person and his heirs, or to a person and his assigns, for his life, it *may in some cases be assigned.* Thus Jenkins states it to have been held by all the Judges in the Exchequer Chamber, that when the office of chamberlain of the exchequer was granted to A and his assigns, A might assign it, but could not make a deputy, without special words to enable him. (*b*)

32. There is, however, great obscurity in the books respecting the assignment of offices. In a case reported by Hardress, the question was, whether the office of teller of the exchequer, which had been granted to a man, *habendum* to him and his assigns, during his life, could be assigned. Sergeant Glynn contended that the office was assignable, by reason of the word assigns in the patent: but else, it would not have been assignable, being an office of trust, which concerned the King in his revenue. That some offices were in their nature assignable, without the word assigns, and some not; as a parkership was an office assignable in its nature, being an office of profit. Others were not, viz. offices of public trust, as the office in question. So offices granted to men and their assigns were assignable; and there was no inconvenience in such a case; for if assigned to an unfit person, the Court would refuse to admit him. Sir Heneage Finch argued on the other side,—1. That the office was not assignable, without the word assigns; because it was an office of great and public trust. 2. That the *habendum* did not alter the thing, it being in the King's case; for it would be inconvenient that the King should have an officer in such a place put upon him against his will; and *habendum* to him and his assigns was no other

(*a*) Curle's cases, 11 Rep. 2. Savage's case, Dyer, 259.
(*b*) Jenk. Cent. 3, ca. 89. Plowd. 378. 9 Rep. 48 b. Hob. 170.

than if it had been to him and his heirs, which would have *been void. In Hatton's case, the office of a garbler *104 granted to one with power to make a deputy did not extend to an assignee, because it was an office of trust. There was no precedent of an assignment of such an office. (*a*)

No judgment was given in this case, the King having stopped the proceedings by a writ *De Rege inconsulto.*

33. It is laid down by Lord Coke, that "if an office, either in the grant of the King or of a subject, which *concerns the administration, proceeding, or execution of justice*, or the King's *revenue*, or the *commonwealth*, or the *interest, benefit, or safety of the subject*, or the like, *be granted to a man that is inexpert*, and hath *no skill and science to exercise or execute the same*, the *grant is merely void*, and the party disabled by law, and incapable to take the same, *pro commodo Regis et populi;* for only men of skill and knowledge, and ability to exercise the same, are capable of them, to serve the King and his people." (*b*)

34. King Edward IV., by letters-patent, appointed Thomas Vintner to be clerk of the Crown. The Judges of the Court of King's Bench, with the assent of the Judges of the Court of Common Pleas, refused him; because he was not exercised in his office, nor in any other in the Court, as he ought by a long time, and so declared to the King. Upon which the King, by the advice of the Justices, appointed one John West clerk there, who was expert, and sent to the said Justices his letters under his signet, which, after, were enrolled in the same Court that they rejected Vintner, and admitted West. (*c*)

35. A clergyman was made chancellor to a bishop, and confirmed by the dean and chapter; but because he was not learned in the canon and civil law, he was removed by the ecclesiastical commissioners; though it was insisted that he had a freehold, and therefore had prayed a prohibition, yet it was denied. (*d*)

36. A grant of an office requiring skill, to an infant, to be exercised *in præsenti*, is void. But if it is to be exercised *in futuro*, and that he is of full age and expert when the office is to be exercised, the grant is good. (*e*)

37. Where, in the grant of an office, it is *expressly* said, that

(*a*) Dennis *v.* Loving, Hard. 424. (*b*) 1 Inst. 3 b. Jenk. 121.
(*c*) Vintner's case, Bro. Ab. tit. Office, pl. 48. Dyer, 150.
(*d*) Sutton's case, Cro. Car. 65. (*e*) Jenk. 121.

it shall be *exercisable by deputy*, the grantee need not
105* *have such skill and knowledge as is necessary to the execution of the office. (*a*)

38. Offices *merely ministerial*, which *do not require particular skill and knowledge*, and *exercisable by deputy*, may be granted to any person, and even *to women.* Thus, a woman may have the office of the custody of a castle. And Lord Coke mentions an instance of a woman's having the office of a forester in fee simple; but he observes, that she could not execute the office herself, but was obliged to appoint a deputy, during the eyre, who should be sworn. (*b*)

39. The office of high constable was held by the daughter of Humphrey De Bohun, Earl of Hereford and Essex. The office of steward of England was held by Blanch, daughter of Henry, Earl of Lancaster, in whose right John of Gaunt enjoyed the same. The office of earl marshal was held by a female, through whom it passed to the house of Norfolk. And the office of great chamberlain of England is at this moment held by the two sisters and co-heirs of Robert, late Duke of Ancaster. (*c*)

40. Offices which *concern the administration of justice*, such as those of Judges of the King's Courts at Westminster, &c. *must be exercised in person*, and not by deputy. There is, however, *one exception* to this rule; for *sheriffs*, though their office concerns the administration of justice, may, notwithstanding, appoint deputies, by the name of *under-sheriffs.* There are also some offices of the judicial kind, in the creation or grant of which is contained a power of appointing a deputy. Thus the Chief Justices in Eyre may appoint deputies, by the express words of their patents, to exercise the office for them.

41. A *ministerial office*, which is *to be exercised by the grantee in person, cannot be done by deputy.* Thus it is said in Dyer, that the office of carver, *being an office of trust*, cannot be exercised by deputy. But *ministerial offices*, which are *not of trust*, and *do not require any particular skill*, may in general be exercised by deputy. And all offices which may be assigned, may be exercised by deputy. (*d*)

42. Lord Coke says, there is a great *difference between a deputy*

(*a*) Young *v.* Stoell, Cro. Car. 279.
(*b*) Lady Russell's case, Cro. Jac. 17. 4 Inst. 311.
(*c*) Collins's Claims, 119.
(*d*) Dyer, 7 b. pl. 10. Shrewsbury's case, 9 Rep. 46.

and an assignee of an office. For an assignee is a person who has an estate or interest in the office itself, and does all in his own name, for whom his grantor shall not answer, unless it be in special cases. Whereas a deputy has no estate or interest *in the office, but is the officer's shadow; he does *106 all things in the name of the officer, and nothing in his own name; and for whom his grantor shall answer. (*a*)

43. [And it would seem that the office of the deputy is revocable at any time by his principal.] (*b*)

44. *A deputy cannot* in general *make a deputy;* for a deputy being only authorized himself, cannot delegate his authority to another. But it has been held, that a steward of a manor, who is authorized to exercise the office by himself or his sufficient deputy, may enable another person to take a surrender of a copyhold out of Court. (*c*)

*45. A deputy is accountable to his principal for the *107 fees and emoluments of the office. And in a case in 3 Ann. it was said by the Court of King's Bench, that if one reserve a sum certain, upon a deputation out of the profits or fees of an office, he only reserves part of that which was wholly his before; for though by making a deputy, the whole power of the principal is in the deputy, yet the fees or profits do not pass, and the deputy has no right to them. Then if he makes a deputy, reserving a sum certain, part of the profits, and the rest of the deputy, he may well do it, for it is but reserving part of what was wholly his. (*d*)

*46. It is enacted by the stat. 5 & 6 Edw. VI. c. 16, *109 that all persons who shall sell any offices, shall lose and forfeit all their right, interest, and estate, in such offices, and in the gift and nomination thereof. And that all persons who shall purchase such offices, shall be disabled from occupying or enjoying the same; and that all such bargains shall be void, with a proviso that all acts of persons offending against this statute, done before they are removed from their offices, shall be good and valid. (*e*)[1]

(*a*) 9 Rep. 48 a. (*b*) Wheeler *v.* Trotter, 3 Swan. 174, 177, *in notis.*
(*c*) Parker *v.* Kett, 1 Ld. Raym. 658.
(*d*) Godolphin *v.* Tudor, 6 Mod. 234. 1 Bro. Parl. Ca. 135. *Infra.* Garforth *v.* Fearon, 1 H. Black. R. 327. (*e*) See also 49 Geo. III. c. 126.

[1] This statute has been adopted *in hæc verba* in *Kentucky;* Rev. St. 1834, Vol. II. tit.

110* *47. It was resolved, in a modern case, that a *contract* with the warden of the Fleet prison, who held only for life, under the Crown, that *for a sum of money he should surrender the office* to the King, *to the intent* that he should *procure* from the King *a grant of the office to the purchaser*, was void by the statute 5 & 6 Edw. VI., though that office had been and might be granted to a subject in fee; and that a bond given to secure the payment of such consideration money, could not be enforced in a court of law. (*a*)

48. In another case, it was held, that *a bond* given by any of the officers mentioned in the statute 5 & 6 Edw. VI., *for securing all the profits of an office to the person appointing*, was void by that statute. So was a bond given by such an officer, to surrender the office, whenever the person appointing chose. (*b*)

49. An agreement by a deputy, to pay his principal *half the profits of the office*, is not within the statute, because it is not to pay him a sum in gross, but only a part of the profits; 111* which must be sued for in the principal's name, for *they all belong to him; though a share is to be allowed out of them to the deputy for his trouble. But where an auditor of Wales appointed a deputy; and it was agreed between them that

(*a*) Huggins *v.* Bambridge, Willes, 241.
(*b*) Layng *v.* Paine, Willes, 571. Law *v.* Law, Forrest, 140.

130, p. 1242; and is found, nearly *verbatim*, in the statutes of *North Carolina*. Rev. Stat. 1836, Vol. I. ch. 34, § 34, p. 198. It is also substantially reënacted in *Virginia;* Tate's Digest, p. 706; with a *proviso* that it shall not prohibit the appointment of a deputy clerk, or deputy sheriff, to assist his principal in the execution of his office. Under this proviso it has been held, that the appointment of a deputy sheriff to perform *all* the duties of the office, and take all the emoluments, for a sum in gross, was valid. Salling *v.* McKinney, 1 Leigh, 42. But Carr, J., dissented, giving an elaborate opinion. *Ideo quære*, and see Tappan *v.* Brown, 9 Wend. 175; 3 Kent, Comm. 455, n. (*b.*) The substance of the statute of Edw. 6, is also found in the codes of *New York*, Rev. Stat. Vol. II. p. 781, 3d ed.; *South Carolina*, Stat. at Large, Vol. III. p. 468; and *Missouri*, Rev. St. 1845, ch. 47, p. 390, 391. In other States, the act of sale is regarded as a misdemeanor, and the contract is held void, as against good morals and public policy. Meredith *v.* Ladd, 2 N. Hamp. 517; Carleton *v.* Whitcher, 5 N. Hamp. 196; Cardigan *v.* Page; 6 N. Hamp. 182, 191; Haralson *v.* Dickens, 2 Car. Law. Repos. 66; Outon *v.* Rodes, 3 Marsh. 438; Stackpole *v.* Earle, 2 Wils. 131; Greville *v.* Atkins, 4 M. & R. 372; 9 B. & C. 462; Waldo *v.* Martin, 6 D. & R. 364; 4 B. & C. 319; Hughes *v.* Statham, 6 D. & R. 219; 4 B. & C. 187. It is the sale of a public trust, and therefore a fraud upon the State. E. Ind. Co. *v.* Neave, 5 Ves. 181. How far Courts may go, in deciding on grounds of public policy, *quære;* and see the observations of Best, C. J., in Richardson *v.* Mellish, 2 Bing. 229.

the deputy should receive all the fees, &c., and pay the principal a certain sum of £200 per annum, this was held void. (*a*) †[1]

50. [And as *a public office* relating to the administration of justice cannot be sold, so its *profits and emoluments cannot be assigned as a security* for the debts of the officer.

51. Thus in the recent case of Palmer *v.* Bate, the Clerk of the Peace for the City and Liberty of Westminster, which office he held for life, assigned the emoluments and profits of the office to two trustees upon trust thereout to pay the salary of the deputy, the expenses of the office and of the trust, and in the

(*a*) Gulliford *v.* De Cardonel, 2 Salk. 466. Godolphin *v.* Tudor, Id. (more fully reported in Willes, 575, note (f), 1 Bro. Parl. Ca. 135. Parsons *v.* Thompson, 1 H. Bl. 322. (Blatchford *v.* Preston, 8 T. R. 89.)

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† [See also Waldo *v.* Martin, 4 Barn. & Cress. 319; Greville *v.* Atkins, 9 Ib. 462; Palmer *v.* Vaughan, 3 Swan. 173.]

[1] "If an officer has a certain salary, or certain annual profits, a deputation of his office, reserving a sum not exceeding the amount of his profits, has been held not to be contrary to the statute, because the principal is entitled to the fees and perquisites of the office, and the deputy to a recompense for his labor, in the execution of it. So, if the profits be uncertain, the deputy may lawfully agree to pay so much out of the profits, for in that case he cannot be charged for more than he receives. But if the office consists of uncertain fees and profits, and the deputy agrees to pay a certain sum annually, without restricting the payment to the proceeds of the profits, it would be a sale within the statute; and the case is not altered by the office yielding more in contingent profits than the amount of the money stipulated to be paid. It would also be a contract within the purview of the statute, for the deputy to secure all the profits to the person appointing him, for this would infallibly lead to extortion in the deputy." 3 Kent, Comm. 455. See, also, Garforth *v.* Fearon, 1 H. Bl. 327; Noel *v.* Fisher, 3 Call. 215; Mott *v.* Robins, 1 Hill, N. Y. R. 21. If the deputy is entitled by law to certain established fees and perquisites, independent of the appointing officer, and he agrees to give the latter a portion of such fees or perquisites, it is a purchase of the deputation, and void under the statute. Becker *v.* Ten Eyck, 6 Paige, 68. The practice of sheriffs, in requiring from their deputies the payment of a certain portion of their fees, is legal only because permitted by other statutes; and if more is agreed for than the proportion limited by the statute, the contract is totally void. Farrar *v.* Barton, 5 Mass. 395; Mattoon *v.* Kidd, 7 Mass. 33.

Where a person receives a deputation to a public office, which entitles him, by statute, to a certain *percentage* upon the fees and emoluments of the office of his principal, and on receiving his appointment, enters into an agreement to perform the duties of his office for a *fixed salary*, such agreement is void, being contrary to the statute against buying and selling offices; though it be not certain that the stipulated sum would be less than the percentage allowed by law. Tappan *v.* Brown, 9 Wend. 175.

But in *Connecticut* it has been held, apparently on the ground of immemorial usage, that a contract by a deputy sheriff to pay to the sheriff a certain sum in gross, *per annum*, by way of remuneration for his responsibility, was valid. De Forest *v.* Brainerd, 2 Day, 528, 530.

next place for securing certain debts, and to pay the surplus to the assignor. The Court of C. B. upon a case sent by Sir John Leach, V. C., decided that the assignment was invalid.] (*a*)

112* *52. As the provisions of this statute do not extend to all the cases within the mischief which it was intended to prevent, *courts of equity have frequently interposed;* for though penal laws are not to be extended, as to penalties and punishments, yet if there be a public mischief, and a court of equity sees *private contracts* made to *elude laws enacted for the public good*, it will interpose. (*b*)

53. A person gave a sum of money to another for procuring him a commission in the marines. Lord Henley decreed the bargain void; and said — "I lay down this *rule*, that if a man sells his interest, to procure *a permanent office of trust or service under government*, it is *a contract of turpitude;* it is acting against the constitution, by which the government ought to be served by fit and able persons, recommended by the proper officers of the Crown, for their abilities, and with purity." (*c*)

54. Lord Rochefort being groom of the stole to his Majesty, and having the right of recommending pages of the presence, treated with the plaintiffs testator, to recommend him upon a vacancy, on condition that he should grant two annuities to particular persons. An action being brought on the bonds securing these annuities by the defendant's testator, for the arrears of the annuity, the plaintiffs filed their bill for an injunction. The defendant had demurred, and the demurrer had been over-

113* ruled. *Upon a motion to continue the injunction, upon the merits, the answer being put in, it was argued, on the part of the plaintiffs, that the bonds were *pro turpi causâ;* that Lord Rochefort having a confidence placed in him by the King, had abused that confidence by selling his recommendation; and that upon the public policy of the law, such an agreement ought not to stand. On the other hand it was argued, that it was allowed this was not an office within the statute of Edward VI.; that it was merely an office respecting the King's private, not his public character; and if it was *turpis contractus*, that might have been pleaded at law. (*d*)

(*a*) 2 Bro. & B. 678.
(*b*) Treat. of Eq. B. 1, c. 4, s. 4.
(*c*) Morris *v.* M'Cullock, Ambl. 432.
(*d*) Harrington *v.* Du Chatel, 1 Bro. C. C. 124.

Lord Thurlow expressed his doubts whether it might not have been brought upon the record at law by a plea, and made a defence there to the action; but thought that not a sufficient reason to prevent his interposition; the courts of law never having determined that it could be so brought there as a defence; admitting that it was not within the statute of Edward VI., but treating it as a matter of public policy, and similar to marriage brocage bonds, where, though the parties are private persons, the practice is publicly detrimental. He ordered the injunction to be continued till the hearing; afterwards, upon the hearing, he ordered it to be perpetual. (*a*)

55. Offices may be *lost by forfeiture*, by *acceptance of another office incompatible* with that which the person already holds, or by the *destruction of the principal office*, or the *determination of the thing* to which the office was annexed.[1]

56. Offices of every kind are not only subject to *forfeiture for treason or felony*, like other real property, but it is also a general rule, that if a person having an office does *any thing contrary to the nature and duty of it;* or *refuses to perform the services* annexed to it, the office is forfeited; for in the grant of every office, there is a condition implied, that the grantee shall execute it faithfully and diligently. (*b*)

57. It was said in Lord Shrewsbury's case, that "there are three causes of forfeiture or seizure of offices, for matter of fact, as for *abusing*, *not using*, or *refusing*. *Abusing* or *misusing;* as if the marshal or other gaoler suffer voluntary escapes, it is a *forfeiture of their offices. So if a forester or park- *114 keeper fell and cut down wood, unless for necessary brush, it is a forfeiture of their offices; for destruction of vert is destruction of venison. As to *non-user*,† there is a difference: when the

(*a*) Hartwell *v.* Hartwell, 4 Ves. 811. (*b*) Litt. s. 378. 3 Bar. & Cress. 619.

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[1] Any *civil* office may be vacated at any time, by *resignation;* which should regularly be made to the body or authority which made the appointment. The executive has no power to refuse the resignation, and compel the officer to continue in office. U. States *v.* Wright, 1 McLean, 509.

If no particular mode of resignation is provided by law, and the appointment is not by deed, the resignation and its acceptance may be by parol. Van Orsdall *v.* Hazard, 3 Hill, N. Y. Rep. 243.

[† Whether non-user is a cause of forfeiture of a public office, in general depends on the nature of the office, the time of non-user, and several circumstances. 2 Ves. Jun. 6, per Sir Dudley Ryder, Lord C. J.]

office concerns the administration of justice, or the commonwealth, and the officer *ex officio*, or of necessity, ought to attend without any demand or request, there the non-user or non-attendance in court is a forfeiture. As the office of chamberlain in the Exchequer, prothonotary, &c., in the Common Pleas, &c.; for the attendance of these and the like officers is of necessity, for the administration of justice. So the attendance of the clerk of the market is of necessity for the common wealth: so of holding the sheriff's tourn. But when the officer ought not to attend or exercise his office, but on demand or request to be made by him to whom he is officer, there non-user or non-attendance is no cause of forfeiture, without demand or request made. But when the office concerns any man's private property, and the officer ought, *ex officio*, to attend his office without request, there the non-user or non-attendance is no cause of forfeiture; unless the non-user or non-attendance is cause of prejudice or damage to him whose officer he is, in something which concerns his charge. As if a parker, or *custos parci*, does not attend one or two days, and within these days no prejudice or damage happens, it is no forfeiture; but if, by reason of his absence, persons unknown kill any deer, it is a forfeiture of his office. As to *refusal*, it is to be known, that in all cases when an officer is bound upon request to exercise his office, if he do it not upon request, it is a forfeiture. As if the steward of a manor is requested by the lord to hold a court, which he does not, it is a forfeiture." (*a*)

58. A filazer of the Court of Common Pleas was absent from his office during two years, and farmed it from year to year, without leave of the Court, for which he was discharged, and no record of the discharge was entered on the roll. Upon his bringing an assise, this was held a good discharge. (*b*)

115* *59. It has been held *in some cases*, that where there are *two joint officers*, the *forfeiture of one* is a *forfeiture of the other;* for both are one and the same officer, and the office is entire. It has, however, been determined, that where an office is granted to two, and one of them is attainted of treason, the other shall not forfeit. (*c*)

60. Sir E. Nevill, and Henry Nevill, his son, were keepers of

(*a*) 9 Rep. 50 a.
(*b*) Vaux v. Jefferen, Dyer, 114 b.
(*c*) Bro. Ab. tit. Office, pl. 51.

Alyngton Park, with a certain fee, during their lives, and the life of the longest liver of them. Sir E. Nevill was attainted of treason. The question was, whether the King should have the office by the attainder. Resolved, that being only an office of skill and confidence, the same was not forfeited to the King; but that the survivor should hold the same during his life. (*a*)

61. Where an ecclesiastical office is forfeited, the benefit of it goes to the King, as supreme ordinary. And where a principal officer is authorized to appoint inferior officers under him, if such inferior officers commit a forfeiture, the superior officer shall take advantage thereof. (*b*)

62. A person may lose an office *by the acceptance of another office, incompatible* with that which he already holds. And all offices are incompatible and inconsistent *where they interfere with each other*, for that circumstance creates a presumption that they cannot be both executed with due impartiality. (*c*) [1]

63. Thus, where a forester, by patent for life, having been made justice in eyre of the same forest, *hac vice*, the forestership was held to become void; for these offices were incompatible, because the forester was under the correction of the justice in eyre, and he could not correct himself. (*d*)

64. Upon a mandamus to restore a person to the office of town clerk, it was returned that he was elected mayor, and sworn, therefore they chose another town clerk. The Court was strongly of opinion that the offices were incompatible, because of the subordination. (*e*)

*65. An *incidental office* may be lost by the *destruction of the principal office*, or the determination of the thing to which the office was annexed. (*f*) *116

(*a*) Nevill's case, Plowd. 378.
(*b*) Woodward *v.* Foxe, 3 Lev. 289. Poph. 119. 2 Verm. 174. (*c*) 4 Bar. & Adol. 9.
(*d*) 4 Inst. 310.
(*e*) Verrior *v.* Mayor of Sandwich, Sid. 305. Milward *v.* Thacher, 2 T. R. 81. And see 9 Barn. & Cress. 703. (*f*) Howard's case, Cro. Car. 59.

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[1] Thus, the offices of sheriff, deputy sheriff, and coroner, in *Maine*, are incompatible with that of justice of the peace. 3 Greenl. R. App. p. 484; Bamford *v.* Melvin, 7 Greenl. R. 14.

The appointment of a person to an office, incompatible with one which he already holds, is not absolutely void; but the first office becomes vacant by his acceptance of the second, and becoming legally qualified to discharge its duties. The People *v.* Carrique, 2 Hill, N. Y. Rep. 93. [See, also, Troy *v.* Wooten, 10 Ired. 377.]

66. [The King, in the exercise of his prerogative, may by letters-patent *suspend* a public officer, though the office be granted for life. And after suspension the officer is entitled to receive the salary, but not to exercise the functions of the office. (*a*) [1]

117* *67. Although the statute of 5 & 6 Edward VI. § 91, does not extend to commissions in the army, yet upon principles of public policy the Courts have repeatedly decided that an *assignment by an officer* in the army or navy *of his full or half pay* is invalid. Neither if he becomes bankrupt will it pass to the assignees for the benefit of his creditors. Emoluments of this sort, as Lord Kenyon observes, being granted for the dignity of the State, and for the decent support of those persons who are engaged in its service; and that it might as well be contended that the salaries of the Judges, which are granted to support the dignity of the State and the administration of justice, may be assigned. Neither can an officer in the army pledge or mortgage his commission. (*b*)

68. But *pay which is actually due*, as well as *pensions for past services*, may be aliened; but pensions for supporting the grantee in the performance of future duties are inalienable.] (*c*) [2]

(*a*) 3 Swan. 178, note from Lord Nottingham's MSS.

(*b*) 2 Anst. 533. 1 Hen. Bl. 627. 3 Bos. & Pul. 328. Flarty *v.* Odlum, 3 T. R. 681. Stuart *v.* Tucker, 2 W. Bl. 1137. 1 Ball. & Bea. 389. Collyer *v.* Fallon, T. & Rus. 659.

(*c*) 3 T. R. 683. 1 Swan. 79.

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[1] In the United States, public officers, whose tenure of office is not otherwise established, may generally be removed by the power which appointed them. See *ante*, § 4, note. A statute, declaring that an officer shall be removed on a certain application, means that he shall not be removed without such application. Commonwealth *v.* Sutherland, 3 S. & R. 145.

[2] The distinction between a pension granted for past services, and one granted as a consideration for some continuing duty or service, and the reason why the former is assignable and the latter not, is clearly stated by Parke, B., in Wells *v.* Foster, 8 M. & W. 149. And see M'Carthy *v.* Goold, 1 Ball & Beat. 389.

It has been held, that an assignment of the quarter's salary of a city marshal, an officer annually appointed by the mayor and aldermen, made during the current quarter, was valid, on the ground that it was a possibility coupled with an interest. Brackett *v.* Blake, 7 Met. 335.

*TITLE XXVI. *118

DIGNITIES.[1]

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[1] As this title concerns only the rights of the English nobility, it is deemed superfluous to retain it in this edition.

TITLE XXVII.

FRANCHISES.

BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES. Book II. ch. 3, § 7.
KENT'S COMMENTARIES. Vol. III. Lect. 52, § 4.
COMYNS'S DIGEST. Tit. *Franchises.*
JOSEPH K. ANGELL and SAMUEL AMES. A Treatise on the Law of Private Corporations aggregate.
J. W. WILCOCK. The Law of Municipal Corporations.
HENRY SCHULTES. An Essay on Aquatic Rights.
JOSEPH K. ANGELL. A Treatise on the Common Law in relation to Water-courses, ch. 6, 7.
The same. A Treatise on the Right of Property in Tide Waters.
LOMAX'S DIGEST. Vol. I. tit. 19.
DANE'S ABRIDGMENT. Vol. II. ch. 68.

SECT. 1. *Nature of.*
2. *A free Fishery.*
7. *Fairs and Markets.*
14. *How Franchises may be claimed.*
16. *How they may be lost.*
17. *Reunion in the Crown.*
19. *Surrender.*
20. *Misuser or Abuser.*
24. *Non-user.*

SECTION 1. A franchise is a *royal privilege*, or branch of the King's prerogative, *subsisting in a subject by a grant from the Crown.* Formerly grants of royal franchises were so common, that in the parliament held in 21 Edw. III. there is a petition from the Commons to the King, stating that franchises had been so largely granted in times past, that almost all the lands were enfranchised, to the great *averisement* and *estingsement* of the common law, and in great oppression of the people; praying the King to restrain such grants for the time to come. To which his Majesty answered, that the franchises which should be granted in future should be made with good advisement.

Franchises are extremely numerous, and of various kinds; but only some of them will here be treated of, which are immediately annexed to, or connected with, real property. (*a*)[1]

(*a*) Rot. Parl. Vol. 11, 16.

[1] The franchises of Forest, Chase, Park, Free Warren, Manor, Game, Court Leet,

*2. A *free fishery* or *exclusive right of fishing in a* *261
public river, is a royal franchise which is now frequently vested in private persons, either by a grant from the Crown, or by prescription.[1] This right was probably first claimed by the Crown upon the establishment of the Normans here, and was deemed an usurpation by the people; for by King John's *Magna Charta* *it is enacted that where the banks of a *262
river had been first defended in his time, they should be laid open. And in the Charter of King Henry III. c. 16, it is enacted that no banks shall be defended from thenceforth but such as were in defence in the time of King Henry II. by the same places, and the same bounds as they were wont to be in his time. And although it is said in the Mirror that this statute is out of use, yet Sir W. Blackstone observes that in consequence of it, a franchise of free fishery ought now to be at least as old as the reign of King Henry II. (*a*)[2]

(*a*) 2 Inst. 29. 2 Bl. Comm. 39.

Waif, Wreck, Estray, Treasure-Trove, Royal Fish, Goods of Felons, and Deodands, which form the body of this title in Mr. Cruise's work, have no existence in the United States, and afford but few and remote illustrations of any principles of our law of real property. Those subjects, therefore, are entirely omitted in this edition. The others are retained for the sake of the doctrines involved in them, which are useful and interesting to the American lawyer.

[1] A several fishery in navigable waters is an incorporeal and not a territorial hereditament, and therefore cannot be created without deed. The owner of such a fishery where the terms of the grant are unknown, is presumed to be the owner of the soil. D. of Somerset *v.* Fogwell, 5 B. & C. 875. [If a several right of fishery on the land of another can be acquired by prescription, it must be by an actual and exclusive occupation and enjoyment of the fishery, adverse to the riparian proprietor, and continued for at least twenty years. An adverse occupation of A for a number of years, but afterwards abandoned, cannot be added to a subsequent occupation by B to give B a prescriptive right, although A, after such abandonment, released all his right in the fishery to B; and an occupation of a fishery for several years by B, in the employment of A, cannot give B any prescriptive rights against C, although A himself claims adversely to C. McFarlin *v.* Essex Company, 10 Cush. 304; Day *v.* Day, 4 Maryland, 262.]

[2] Whether, since Magna Charta, the sovereign has power to grant a portion of the soil, covered with navigable waters, so as to give the grantee an immediate and exclusive right of fishery within the limits of the grant, is a question not free from doubt. But from the opinions expressed by the Justices of the Court of King's Bench, in Blundell *v.* Catterall, 5 B. & Ald. 287, 294, 304, 309, and in D. of Somerset *v.* Fogwell, 5 B. & C. 883, 884, the question must be regarded as settled, in England, against the right of the King, since Magna Charta, to make such a grant. Martin *v.* Waddell, 16 Pet. 367, 410, per Taney, C. J. Mr. Schultes supports the same conclusion,

3. It is laid down by Lord Hale in his treatise *De Jure Maris*, that though *primâ facie* an arm of the sea be, in point of pro-

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with great force of reasoning and weight of authority. Schultes on Aquatic Rights, pp. 67–80.

In this country, when the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the General Government. Ibid. And as among the rights thus surrendered, the right of soil under the navigable waters, and of granting exclusive rights of fishing therein, is neither enumerated nor necessarily implied, it results that this right, if it exists at all, remains in the several States. On the contrary, in regard to the territory comprising the southwestern States, and those northwest of the Ohio River, which was ceded to the United States by the States of Georgia and Virginia, and by the French treaty of 1803, it has been decided that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory of which any of the new States were formed, except for temporary purposes and to execute the trusts created by the instruments of cession; and that upon the creation of a new State, those rights passed to it; nothing remaining in the United States except the public lands; and that therefore a subsequent grant, by the United States, of the exclusive title to lands below high-water mark was void. Pollard *v.* Hagan, 3 Howard, S. C. Rep. 212, 230.

In several of the States, the doctrine that all navigable waters were the *exclusive* property of the crown, has been recognized; and it has been held, that, as all the rights of the crown became vested in the several States, and this right among others, each State was competent to grant an exclusive fishery in navigable waters; and that therefore such right might be claimed by grant or prescription, notwithstanding the provision of Magna Charta. 3 Kent, Comm. 416; Stoughton *v.* Baker, 4 Mass. 522; Chalker *v.* Dickinson, 1 Conn. 382; Jacobson *v.* Fountain, 2 Johns. 170; Gould *v.* James, 6 Cowen, 369; confirmed in Rogers *v.* Jones, 1 Wend. 237, 255–259; where the doctrine is fully and ably discussed, both at the bar, and by Woodworth, J. Angell on Tide Waters, ch. 5. Ibid. ch. 7. [An act of the legislature of a State regulating the time and manner of taking fish in the sea within the territorial limits of the State, is within the authority of the state legislature, and is binding on citizens of other States and on vessels enrolled and licensed as fishing vessels under the laws of the United States. Dunham *v.* Lamphier, 3 Gray, 268. The State may permit a private oyster fishery in the public waters of the State. State *v.* Sutton, 2 R. I. 434.]

But in other States it has been held, that whatever title the King had to the navigable rivers and arms of the sea, it was held only as part of the *jura regalia* or *jus publicum*, in trust for all the people, and incapable of being granted exclusively to any individual; and that therefore no exclusive fishery in those waters could now be either prescribed for, or granted by the State. See Arnold *v.* Mundy, 1 Halst. 1; Martin *v.* Waddell, 16 Pet. 367; Gough *v.* Bell, 10 Law Rep. 505; Cates *v.* Wadlington, 1 McCord, 580; Collins *v.* Benbury, 3 Ired. 277; Carson *v.* Blazer, 2 Binn. 475; Shrunk *v.* Schuylkill Nav. Co. 14 S. & R. 71. See also, 1 Lomax, Dig. pp. 515–517; Commonwealth *v.* Wright, 3 Am. Jur. 188, per Thacher, J.; Angell on Tide Waters, ch. 5, p. 143.

As to the term "*navigable*," it is commonly said that those are navigable waters *where the sea ebbs and flows*. On the other hand it has been held, that a navigable stream existed when the waters were sufficient in fact to afford a common passage

priety, the King's, and common for every subject to fish there; yet a subject may, by usage, have a several fishery there, exclusive of that liberty, which otherwise of common right belongs to all the King's subjects. And this doctrine is confirmed by the following case. (*a*)

4. An action of trespass was brought by the plaintiff for entering his close, called the River Severn. The defendant pleaded that it was a navigable river; and also that it was an arm of the sea wherein every subject had a right to fish. The plaintiff, without traversing these allegations, replied, that this was a part of the manor of Arlingham; that a Mrs. Yates was seised of that manor, and prescribed for a several fishery there.

Issue being joined thereon, a verdict was found for the plaintiff. On a motion in arrest of judgment, on the ground that an exclusive right could not be maintained by a subject, to fish in a river that was an arm of the sea, the general right of fishing in a navigable river, or arm of the sea, being common to all,—Lord Mansfield said, the rule of law was uniform. In *rivers not navigable*, the *proprietors of the land* had the right of fishery on their respective sides; and it generally extended *ad filum medium aquæ*. But in *navigable rivers* the proprietors of the land on

(*a*) Hargrave's Tracts, 19.

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for people in *sea vessels*. Collins *v.* Benbury, *supra*. Others have insisted from the analogy of the revenue laws, that to constitute navigable waters, they must be approachable from the sea in vessels of at least *ten tons burden*. But in Rowe *v.* The Granite Bridge Co., 21 Pick. 344, 347, where this question was directly in judgment, it was held, that a stream or creek, in order to be deemed "*navigable*," must not only be sufficient to float a fishing skiff or gunning canoe, but must be navigable generally and commonly, and not at extraordinary high tides only, *to some purpose useful to trade or agriculture*. And see 10 Law Rep. 509. Upon this very reasonable ground, the great rivers in the United States are deemed "navigable rivers," far above the perceptible flow of the tide, or the appearance of any saltness in the water. See Angell on Tide Waters, ch. 3, pp. 77–79; Carson *v.* Blazer, 2 Binn. 477, per Tilghman, C. J.; Ibid. 484, per Yates, J.; Cates *v.* Wadlington, *supra*.

A distinction, however, has been taken between that part of navigable rivers which is above the flow of the sea and that which is below, so far as the right of fishery is concerned; and it has been held, that in the latter portion only the right is public and common, while in the former it is exclusive in the riparian proprietor, *usque ad filum aquæ*, subject only to be regulated in its exercise by the general statutes. Commonwealth *v.* Chapin, 5 Pick. 199, 202; Adams *v.* Pease, 2 Conn. 481; Hooker *v.* Cummings, 20 Johns. 90. [See Moulton *v.* Libbey, 37 Maine, (2 Heath,) 472; Weston *v.* Sampson, 8 Cush. 347; Lewis *v.* Keeling, 1 Jones, Law, (N. C.) 299. *Ante*, tit. 23, § 34, note, p. * 71.]

each side had it not; the *fishery was common;* it was *primâ facie* in the King, and was public. If any one claimed it exclusively, he must show a right. If he could show a right by prescription, he might then exercise an exclusive right; though the presumption was against him, unless he could prove such a prescriptive right. Here it was claimed and found. It was therefore consistent with all the cases that the plaintiff might
263* have an *exclusive privilege of fishing; though it were an arm of the sea. Such a right should not be presumed, but the contrary, *primâ facie;* it was, however, capable of being proved, and must have been so in this case. The rule was discharged. (*a*) [1]

5. Sir W. Blackstone says, that a right of free fishery does not imply any property in the soil, in which respect it differs from a several fishery; and that from its being an exclusive right, it follows that the owner of a free fishery has a property in the fish before they are caught. Mr. Hargrave, however, observes, that "both parts of this description of a *free* fishery seem disputable. Though, for the sake of distinction, it might be more convenient to appropriate *free fishery* to the franchise of fishing in *public* rivers, by derivation from the Crown; and though in other countries, it may be so considered, yet, from the language of our books, it seems, as if our law practice had extended this kind of fishery to all streams, whether private or public; neither the Register or other books professing any discrimination. In one case the Court held *free fishery* to import an *exclusive* right, equally with *several piscary;* chiefly relying on the writs in the Register, 95 *b*. But this was only the opinion of two Judges against one, who strenuously insisted that the word *libera, ex vi termini* implied *common;* and many judgments and precedents were founded on Lord Coke's so construing it. That the dissenting Judge was not wholly unwarranted in the latter part of his assertion, appears from two determinations, a little before the case in question. To these might be added the three

(*a*) Carter *v.* Murcot, 4 Burr. 2162.

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[1] "The doctrine as laid down in the case of Carter *v.* Murcot, is universally recognized as the settled law on the subject, and is fully adopted and sanctioned by the courts of this country." Per Thompson, J., in Martin *v.* Waddell, 16 Pet. R. 425, 426.

See also, Gould *v.* James, 6 Cowen, 376, per Savage, C. J. But it has been universally admitted only with the qualifications stated in the note to § 2, *supra*.

cases cited by Lord Coke, as of his own time; and there are passages in other books which favor the distinction." (*a*)

6. It is laid down by Lord Ellenborough, in a modern case, that the erection of weirs across rivers was reprobated in the earliest periods of our law.[1] They were considered as public nuisances, were treated as such by *Magna Charta* and subsequent acts, which forbid the erection of new ones, and the enhancing, straitening, or enlarging of those which had aforetime existed. That the stells erected in the river Eden by Lord Lonsdale and the Corporation of Carlisle, whereby all the fish were stopped in their passage up the river, were pronounced to be illegal, and a public nuisance. The Court also held, that where a weir had formerly been made of brushwood, through which it was * possible for the fish to escape into the upper part of the * 264 river, it could not be converted into a stone weir, whereby the possibility of escape was debarred; though, in flood times, the fish might still overleap it. And however twenty years' acquiescence might bind the parties, whose private rights only were affected, yet the public had an interest in the suppression of public nuisances, though of longer standing. (*b*)

7. Another franchise frequently annexed to a manor is the right of holding a *fair*, or *market*, which is derived from the royal prerogative in the same manner as other franchises. But where the King grants a patent for holding a fair or market, it is usual to have a writ of *ad quod damnum* executed and returned; for though fairs and markets are a benefit to the public, yet too great a number of them may become a nuisance; and if the patent be found to be *ad damnum* of the neighboring markets, it will be void. (*c*)

8. If a person levies a fair or market in a vill next to one in which a fair or market has been long held, to be on the same day, by which the ancient fair or market is impaired, it is a

(*a*) 2 Bl. Comm. 40. 1 Inst. 122 a, n. 7. Smith *v.* Kemp, 2 Salk. 637. Upton *v.* Dawkin, 3 Mod. 97. Peake *v.* Tucker, Carth. 286, marg.

(*b*) Weld *v.* Hornby, 7 East, 195.

(*c*) Rex *v.* Butler, 2 Vent. 344. 3 Lev. 222.

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[1] In the United States, all such obstructions to the exercise of the common right of fishing are held in the like reprobation, and liable to removal by indictment, as nuisances. And the exercise of this right is everywhere held subject to such general regulations as the legislature may prescribe, for the common good.

nuisance. And if a new market be erected without patent in a town, near one where there is an ancient market, it may be a nuisance, though holden on different days. (*a*)

9. Where a grantee of a market, under letters-patent from the Crown, suffered another to erect a market in his
265 * * neighborhood, and to use it for the space of twenty-three years, without interruption, it was adjudged that such user operated as a bar to an action on the case for a disturbance of his market. (*b*)

10. A right of taking toll is usually annexed to a fair and market, though in many instances no toll is due; in which case it is called a *free fair or market;* for toll is not of right incident to a fair or market, and can only be claimed by special grant from the Crown, or by prescription; and if the toll be unreasonable, the grant will be void. (*c*)

11. By the statute of Westm. 1, c. 1, it is enacted, that where persons take outrageous toll, contrary to the common custom of the realm, in market towns, if they do so in a town belonging to the Crown, the King may seise the franchise into his own hands; and if it be in the town of a subject, and the same be done by the lord of the manor, the King shall do in like manner. (*d*)

12. Where the King grants a fair generally, the grantee may hold it where he pleases, or rather where it can be most conveniently held; and if granted to be held in a town, he may hold it in any place in such town. (*e*)

13. Queen Elizabeth granted by charter to Henry Curwen, lord of the vill and manor of Workington, that he and his heirs might hold, within the said vill, a market every Wednesday, forever. By another charter of the 2 Ja. II., reciting the former charter, and that the market thereby granted had not for many years been used, the King proceeded to grant, ratify, and confirm, the same to Henry Curwen, Esq. and his heirs, in the same words, and in as ample a manner as before, *infra villam de Workington.*

The question was, whether the lord of the manor had a
266 * right * to remove the market-place from one situation to another, within the precincts of the vill of Workington.

Lord Ellenborough. "If the lord have a grant of a market

(*a*) 1 Roll. Ab. 140. Fitz. N. B. 184, note. Yard *v.* Ford, 2 Saund. 172.
(*b*) Holcroft *v.* Heel, 1 Bos. & Pul. 400. *Vide* 2 Saund. R. 175 a, note.
(*c*) 2 Inst. 19. Heddy *v.* Wheelhouse, Cro. Eliz. 558. (*d*) 2 Inst. 219.
(*e*) Dixon *v.* Robinson, 8 Mod. 107.

within a certain place, though he have at one time appointed it in one situation, he may certainly remove it afterwards to another situation, within the place named in his grant. This was long ago settled in Dixon *v.* Robinson; and in modern times has been acted upon in the case of Manchester market. There is nothing in reason to prevent the lord from changing the place, within the precinct of his grant; taking care at the same time to accommodate the public. Neither is there any authority which says, that having once fixed it he is compellable ever after to keep it in the same place. In many instances there may be great public convenience in the owner having liberty to remove it, for the buildings in a growing town may take a different direction, away from the old market-place. If the lord, in the exercise of his right, be guilty of any abuse of the franchise, there may be a remedy of another nature. The right of removal, however, is incident to his grant, if he be not tied down to a particular spot, by the terms of it. Till it be removed, the public have a right to go to the place appointed, without being deemed trespassers: but after the lord has removed it, of which public notice was given in this case, the public have no longer a right to go there upon his soil. If a private injury has been sustained by any individual, who has been deceived by the lord having holden out to him a particular site for the market-place, in order to induce him to purchase or build there, for the convenience of it, that may be the subject of an action to recover damages for the particular injury sustained by that individual, but does not preclude the lord's general right to remove the market." (*a*)

14. The franchises, which have been treated of in this title, are of *two sorts:—First*, those which could have no existence till *created by an actual grant;* such as a hundred, and fairs and markets, &c. As to these, a claim to them must be supported by showing the grant thereof from the Crown, if within time of memory. But if before that period, then they must have the aid of some other matter of record, within time of memory, to make them available; as allowances thereof in eyre, or some judgment of record in the King's Courts, in support and *affirmance of them; or some confirmation from the Crown *267 by letters-patent; pleadable as a record. (*b*)

(*a*) Curwen *v.* Salkeld, 3 East, 538. The King *v.* Cotterill, 1 Barn. & Ald. 67.
(*b*) 1 Inst. 114 a. 9 Rep. 27 b.

15. The *other kind* of franchises are those which were *originally part of the royal prerogative;* and do not owe their existence to a grant from the Crown, which had only the effect of transferring them from the Crown, to a subject, such as the free chase, park, warren, &c. To these a title may be *claimed by prescription* and immemorial usage, without the aid of any record; for such immemorial usage induces a prescription of a royal grant made before time of memory. (*a*)

16. Franchises may be *destroyed or lost* by *reunion* in the Crown, by the *surrender* of the person entitled to them, and also by *misuser* or *non-user* of them. But it has been stated that where franchises were annexed to manors, they are not lost by the loss of the manor, but continue to be annexed to the reputed manor. (*b*)

17. It was laid down in the Abbot of *Strata Marcella's* case, that when the King grants any franchises which are in his own hands, as parcel of the *flowers of the Crown*, within certain possessions, there if they come again to the King, they become *merged in the Crown*, and the King has them again *jure coronæ;* and if they were before appendant, the appendancy is extinct. But when franchises are erected and *created by the King de novo*, there by the accession of them again they are *not merged* or extinct. As if a fair, market, hundred, or leet, are appendant to manors, or in gross, and come back to the King, they remain as they were before, *in esse*, not merged in the Crown; for they were at first created and newly erected by the King, and were not *in esse* before; and time and usage has made them appendant. (*c*)

18. If A be seised of a manor, whereunto the franchise of waif, estray, and such like, are appendant, and the King purchases the manor with the appurtenances, now are the royal franchises re-united to the Crown, and not appendant to the manor: but if he grant the manor in as large and ample a manner as A had it, the franchises shall be appendant, or rather appurtenant, to the manor. (*d*)

(*a*) Idem. Tit. 81, c. 1.
(*b*) Soane *v.* Ireland, Dissert. c. 8.
(*c*) 9 Rep. 24. 17 Vin. Ab. 162. Rex *v.* Capper, 5 Price, 217.
(*d*) 1 Inst. 121 b. 9 Rep. 26 a.

19. Franchises may also be destroyed by a *surrender* of them to the Crown, of which there are several instances.

*20. Where the object of a franchise is perverted, and *268 there is either a *misuser* or an *abuser* of it, the franchise is lost. And it is said by Lord Holt that all franchises are granted on condition that they shall be duly executed, according to the grant. So that if the grantees of such franchises neglect to perform the terms, the patents may be repealed by writs of *scire facias.* (*a*)

21. Where a person has a franchise to hold a market every week, on the Friday, and he holds it on the Friday and the Monday, in this case nothing shall be forfeited but that which he hath purprised. But he who has a fair to hold two days, and holds it three days, forfeits the whole. So where a man has a market to hold on the Saturday, and he holds it on another day, the market shall be forfeited, and he shall be fined for the misusing. (*b*)

22. If the King grants to a person a fair for one day in the year, and the grantee holds a fair two days, and claims this upon process in the Exchequer, he shall forfeit his franchise. But if he claims one day by the patent and another by prescription, which is found false in the prescription, he shall not forfeit his patent. (*c*)

23. If a person has several franchises, and the one does not depend upon the other; there, if he misuses any, he shall not forfeit all, but only those which have been misused. But if one depends upon the other, then if he misuses one, all shall be seized and forfeited. (*d*)

24. *Non-user* is also a cause of forfeiture of a franchise. Therefore if a *vill* was incorporated by the King, before time of memory, and the franchise never was used within time of memory, it is lost. (*e*)

25. The franchise of holding a *court leet* will be forfeited, not only by acts of gross injustice, but also by bare omissions and neglects; especially if often repeated, and without excuse. (*f*)

26. George Tottersall claimed, at the justice-seat of the forest of Windsor, a court leet within his manor of F. The Attorney-

(*a*) 12 Mod. 271. (*b*) Bro. Ab. Franchise, pl. 14. (*c*) Idem. pl. 22.
(*d*) Idem. pl. 14. (*e*) Bro. Ab. Franchise, pl. 10 & 26.
(*f*) 2 Hawk. P. C. c. 11, s. 5.

General desired that it might be inquired,—1. If he had used it. 2. If he had an able steward to discharge the office; for the want of that was also a cause of seizure. 3. If he had officers, and those things which are for the execution of justice, as 269* constables, ale-tasters, &c., and pillory, stocks, and * cucking-stool, &c. 4. If he punished bakers more than three times, and did not set them in the pillory. All these were causes of seizure, till he paid a fine for the abuse, and replevied his franchise. Mr. Tottersall himself being called and asked concerning his court leet, confessed that he had not used it a great while, nor were there proper officers or other things for the execution of justice: but he said it appeared by ancient rolls that there had been a leet there. Being asked to what leet his tenants went, he said they went to the sheriff's tourn, and paid head silver there. Upon which Mr. Attorney observed, that Mr. Tottersall could have no leet, for all leets were drawn out of the sheriff's tourn, which was the leet in the King's hands, and head silver was *certum læte*, and no man should be subject to two leets; therefore there could be no allowance of the leet, unless the King should be put out of that which, for aught he knew, he had ever had. So judgment was given against him for the leet. (*a*)

27. Upon a motion for an information in the nature of a *quo warranto*, against one Bridge, for holding a court leet, it appeared that in 14 Jac. I., the Crown granted to R. Miller, his heirs and assigns, the privilege of holding courts leet. No mesne conveyance appeared till 1702, when, and in 1708, 19, and 21, there were conveyances of the manor, with all courts thereunto belonging, to those under whom the defendant claimed. In the deed of conveyance to him in 1739, courts leet were expressly conveyed. In 1740 the defendant held a court leet, the first within the memory of any one living, though courts baron had been frequently held. It was argued that the defendant could not deduce any title under the original grant; or if he could, yet that non-user was a disclaimer, and a forfeiture of such a franchise. On the other side it was contended, that the possession of the grant, together with the land, was an evidence of right; and that it would be of very pernicious consequence to grant

(*a*) Tottersall's case, W. Jones, 288.

these informations, whenever a lord could not deduce a title by mesne conveyances. The Court said, that as there appeared no exercise of the grant till 1740, there was strong suspicion of some defect in the title; therefore it must go to be tried by a jury. The rule for an information was made absolute. (*a*)

*28. It has been determined by the Court of King's Bench, in a late case, that where the King had by charter granted that the steward and suitors of a manor should have power to hold a court, though there had been a non-user for fifty years, yet the right was not lost. (*b*) *270

29. *Free chase* and *warren* may, I presume, like other franchises, be lost by non-user when claimed by prescription, or even by an express grant. As the non-user creates a presumption that the franchise had been surrendered, it is therefore necessary, where a claim of this kind is made, to prove a continued exercise of the right. Though in the case of Leicester forest, Lord Coke, as counsel, said it had been adjudged that the non-user of a fair or market, or courts, or such like liberties, wherein the subjects have interest for their common profit, or common justice, is cause of seizure of them; but the non-user of parks, or warrens, or such like, which are to the profit only, or pleasure of the owner, is not any cause of their loss or forfeiture. This does not however appear to be law; for in a case upon the Oxford circuit in 1810, where Lord Uxbridge claimed free warren, Mr. Justice Lawrence stated to the jury, that to establish a right of free warren it was necessary to prove a constant exercise of the right, down to the time when it is claimed. (*c*) [1]

(*a*) Darell *v.* Bridge, 1 Black. R. 46.
(*b*) Rex *v.* Steward of the manor of Havering, 5 Barn. & Ald. 691.
(*c*) Keilw. 141 b, pl. 13. Cro. Jac. 155. Jenk. 316. *Placita de Quo Warr.* p. 139, 141.

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[1] The subject of Franchises is very briefly treated by the learned Chancellor Kent, in his Commentaries, in the following observations. "Another class of incorporeal hereditaments are franchises, being certain privileges conferred by grant from government, and vested in individuals. In England they are very numerous, and are understood to be royal privileges in the hands of a subject. They contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the conditions and duties prescribed in the grant. Some of these franchises are presumed to be founded on a valuable consideration, and to involve public duties, and to be made for the public accommodation, and to be affected with a *jus publicum*, and they are necessarily exclusive in their nature. The government cannot resume them at pleasure, or do any act to impair the grant, without a breach of

contract. The privilege of making a road, or establishing a ferry, and taking tolls for the use of the same, is a franchise, and the public have an interest in the same; and the owners of the franchise are liable to answer in damages, if they should refuse to transport an individual without any reasonable excuse, upon being paid or tendered the usual rate of fare. The obligation between the government and the owner of such franchises is mutual. He is obliged to provide and maintain facilities for accommodating the public, at all times, with prompt and convenient passage. The law, on the other hand, in consideration of this duty, provides him a recompense, by means of an exclusive toll, to be exacted from persons who use the road or ferry, and of course, it will protect him against any new establishment which is calculated to draw away his custom to his prejudice. An estate in such a franchise, and an estate in land, rest upon the same principle, being equally grants of a right of privilege for an adequate consideration. If the creation of the franchise be not declared to be exclusive, yet it is necessarily implied in the grant, as in the case of the grant of a ferry, bridge, or turnpike, or railroad, that the government will not, either directly or indirectly, interfere with it, so as to destroy or materially impair its value. Every such interference, whether it be by the creation of a rival franchise or otherwise, would be in violation or in fraud of the grant. All grants or franchises ought to be so construed as to give them due effect, by excluding all contiguous competition, which would be injurious, and operate fraudulently upon the grant. The common law contained principles applicable to this subject, dictated by sound judgment and enlightened morality. It declared all such invasions of franchises to be nuisances, and the party aggrieved had his remedy at law by an action on the case for the disturbance, and in modern practice he usually resorts to chancery, to stay the injurious interference by injunction. We have nothing to do with a great proportion of the franchises that occupy a large space in the treatises on English law; and whoever claims an exclusive privilege with us, must show a grant from the legislature. Corporations, or bodies politic, are the most usual franchises known in our law; and they have been sufficiently considered in a former volume. These incorporated franchises seem, indeed, with some impropriety, to be classed by writers among hereditaments, since they have no *inheritable* quality, inasmuch as a corporation, in cases where there is no express limitation to its continuance by the charter, is supposed never to die, but to be clothed with a kind of legal immortality. Special privileges conferred upon towns and individuals in a variety of ways, and for numerous purposes, having a connection with the public interest, are franchises." 3 Kent, Comm. 458, 459.

But in regard to the position, that the grant of the franchise of a ferry, bridge, turnpike, or railroad is in its nature exclusive; so that the State cannot interfere with it by the creation of another similar franchise, tending materially to impair its value; it is with great deference submitted, that an important distinction should be observed between those powers of government which are essential attributes of sovereignty, indispensable to be always preserved in full vigor, such as the power to create revenues for public purposes, to provide for the common defence, to provide safe and convenient ways for the public necessity and convenience, and to take private property for public uses, and the like; and those powers which are not thus essential, such as the power to alienate the lands and other property of the State, and to make contracts of service, or of purchase and sale, or the like. Powers of the former class are essential to the constitution of society, as without them no political community can well exist; and necessity requires that they should continue unimpaired. They are entrusted to the legislature to be exercised, not to be bartered away; and it is indispensable that each legislature should assemble with the same measure of sovereign power which was held by its predecessors. Any act of the legislature, disabling itself from the future exer-

cise of powers entrusted to it for the public good must be void, being in effect a covenant to desert its paramount duty to the whole people. It is therefore deemed not competent for a legislature to covenant, that it will not, under any circumstances open another avenue for the public travel within certain limits, or a certain term of time; such covenant being an alienation of sovereign powers and a violation of public duty.

But if, in order to provide suitable public ways, the State has availed itself of private capital, and secured its reimbursement by the grant of a charter of incorporation, with the right to take tolls for a limited period; and the public necessity should afterwards require the creation of another way, the opening of which would diminish the profits of the first, and so prevent the corporators from receiving the compensation intended to be secured to them; the State, thus sacrificing the private property of the corporation for public uses, would unquestionably be bound, as a sacred moral duty, to make full indemnity therefor in some other mode.

All those grants of franchises, therefore, which are in derogation of the essential attributes of sovereignty above mentioned, are to be construed strictly; and nothing is to be taken by implication. It was on this ground that the case of the Warren Bridge was decided. The legislature had granted a charter for the building of the Charles River Bridge, with the right of receiving tolls, and upwards of forty years afterwards, the public exigency requiring another and free avenue between the same places, an act was passed authorizing the erection of the Warren Bridge, a few rods from the former, the opening of which, as a natural consequence, reduced the tolls of the former to a very small amount. And this act was held to be not unconstitutional. Charles River Bridge *v.* Warren Bridge, 11 Peters, R. 420, cited, and its reasoning affirmed, in Butler *v.* Pennsylvania, 10 How. S. C. Rep. 402, (1850); Woodfolk *v.* Nashville, &c. R. R. Co. 1 Am. L. Reg. 550. [See, also, Matter of Hamilton Avenue, 14 Barb. Sup. Ct. 405; Illinois and Michigan Canal *v.* Chicago and R. I. R. R. Co. 14 Ill. 314; Rundle *v.* The Delaware & R. Canal Co. 14 How. U. S. 80; 13 Ib. 71; 10 Ib. 511, 541; Shorter *v.* Smith, 9 Geo. 517.]

The learned Chancellor, in a note appended to the above extract, deeply regrets that decision, concurring in the opinion of Mr. Justice Story, who dissented from it. But against the weight of the opinion of this great Judge, may be placed that of the late Chief Justice Marshall, the writer having been informed, as a fact within the personal knowledge of his informant, that the Chief Justice held the charter of Warren Bridge constitutional, upon the first argument of the cause; and that it was on account of this division of the bench that a second argument was ordered, which he did not live to hear. And it is worthy of notice, in this connection, that Mr. Justice Story, in delivering his dissenting opinion in the same term, in the case of Briscoe *v.* The Bank of the Commonwealth of Kentucky, 11 Pet. R. 328, supports it by referring to a similar opinion held by the late Chief Justice, upon the former argument of that cause; while in the case of Warren Bridge no such support is invoked; doubtless for the reason that it could not be had.

The State being bound in good faith, as already stated, to make full and complete indemnity to individuals, whose private rights, in the exercise of its eminent domain, it has been obliged to sacrifice for the general good, the question is reduced to the mode of compensation; whether actual payment of the damages must precede or accompany the act of the State; or whether the individual ought to have at least a compulsory remedy at law; or whether the pledge of public faith is a sufficient security. On this subject various opinions are held. See 2 Kent. Comm. 338–440, and note (c) on p. 339, 5th ed; 11 Pet. R. 471, 472, 642, 643; The People *v.* White, 4 Law Rep. 177, N. S.

[A franchise was granted in 1766, to one his heirs and assigns to keep up a toll bridge over a certain stream; and the act forbade the erection of any other bridge or ferry within six miles thereof. It was held that it was not violated by a railroad corporation, under a modern charter, constructing a bridge across the stream as part of their road within the six miles, and carrying passengers thereon over their road. McRee *v.* Railroad, 2 Jones, Law, (N. C.) 186. See, also, Boston and L. R. R. C. *v.* Salem and L. R. R. C., 2 Gray, 1; Fanning *v.* Gregoire, 16 How. U. S. 524. An act of incorporation in 1796, authorized the building of a toll-bridge across a navigable river, "with two suitable draws, which shall be at least thirty feet wide," and such bridge was built with such draws. The increased size of ships, making these draws too narrow for the accommodation of the navigation of the river, the legislature, in 1851, passed an act requiring the corporation to widen its draws to a certain specified width. It was held that this act was unconstitutional as interfering with the corporate rights vested under the act of 1796. But it was also held that the clause requiring the corporation to keep "suitable" draws, meant that such draws should be suitable for the increased demands of the navigation of the river, and if a jury should find that the draws were not so suitable, that the corporation could be indicted for a nuisance in obstructing the navigation; the question whether the draws were suitable being for the jury, and not for the legislature. Commonwealth *v.* New Bedford Bridge, 2 Gray, 339.]

TITLE XXVIII.

RENTS.

BOOKS OF REFERENCE UNDER THIS TITLE.

CHIEF BARON GILBERT. A Treatise on Rents.
The Same. The Law of Distresses and Replevins.
ROBERT BUCKLEY COMYN. A Treatise on the Law of Landlord and Tenant.
WILLIAM WOODFALL. The Law of Landlord and Tenant.
JAMES BRADBY. A Treatise on the Law of Distresses.
BLACKSTONE'S COMMENTARIES. Book II. ch. 3, § 10.
KENT'S COMMENTARIES. Vol. III. Lect. 52, § 5.
LOMAX'S DIGEST. Vol. I. Tit. XX.
[JOHN N. TAYLOR. A Treatise on the American Law of Landlord and Tenant. Second Edition, 1852.]

CHAP. I.

OF THE ORIGIN AND NATURE OF RENTS.

CHAP. II.

OF THE ESTATE WHICH MAY BE HAD IN A RENT, AND ITS INCIDENTS.

CHAP. III.

OF THE DISCHARGE AND APPORTIONMENT OF RENTS.

CHAP. I.

OF THE ORIGIN AND NATURE OF RENTS.

SECT. 1. *Origin of Rents.*
4. *Rent Service.*
6. *Rent Charge.*
11. *Rent Seck.*
12. *Other Kinds of Rents.*
13. *Fee Farm Rents.*
15. *What gives Seisin of a Rent.*
16. *Out of what a Rent may be reserved.*
24. *Upon what Conveyances.*
33. *To what Persons.*
46. *At what Time payable.*
SECT. 55. *When it goes to the Executor, and when to the Heir.*
64. *Remedies for Recovery of Rents.*
65. *Distress.*
68. *Clause of Re-entry.*
72. *Entry by Way of Use.*
73. *Ejectment.*
76. *Actions of Debt and Covenant.*
77. *Courts of Equity.*

SECTION 1. It has been stated that when the great lords enfranchised their villeins, they still employed them in the cultivation

of their estates, which they granted to them, either from
272* year to year, or * for a certain number of years; reserving to themselves an annual return from the tenant, of corn or other provisions. Hence the lands thus granted were called farms, from the Saxon word *feorm*, which signifies provisions. (*a*)

2. This compensation or return for the use of the land thus let, acquired the name of *redditus*, rent; and is *defined* by Lord Ch. B. Gilbert, to be *an annual return made by the tenant*, either in *labor*, *money*, or *provisions*, in *retribution for the land* that passes;[1] from which it follows, that though rent must be a profit, yet there is no occasion that it should consist of money; for capons, spurs, horses, and other things of that nature, may be reserved by way of rent; and it may also consist of services or manual labor, as to plough a certain number of acres of land. (*b*)

3. The *profit reserved* as rent *must be certain*, or that which may be reduced to a certainty, by either party.[2] It must also be *payable yearly*, though it need not be reserved in every successive year; but will be good if reserved in every second or third year. It must also *issue out of the thing granted*, and not be a part of the thing itself; for a person cannot reserve a part of the annual profits themselves, as the vesture or herbage of land. (*c*)

4. There are *three kinds* of rent; namely, *rent-service*, *rent-charge*, and *rent-seck*. Where a tenant holds his land by fealty and certain rent, it is a *rent-service;* and this was the only kind of rent originally known to the common law. A right of distress was inseparably incident to it, as long as it was payable to the lord who was entitled to the fealty of the tenant. And it was called a rent-service, because it was given as a compensation for the services to which the land was originally liable. (*d*)

5. We have seen that in consequence of the statute *Quia*

(*a*) Tit. 8, c. 1. (*b*) Gilb. Rents, 9. 1 Inst. 142 a. (*c*) Idem.
(*d*) Lit. s. 213. Kenege *v.* Elliott, 9 Watts, 258. Cornell *v.* Lamb, 2 Cowen, 652.

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[1] Rent issues out of the *land only;* it does not issue out of a mere privilege or easement. Buszard *v.* Capel, 8 B. & C. 141, per Lord Tenterden.

[2] See *post*, s. 65, note.

Emptores,[1] if a person makes a feoffment in fee, or gift in tail, with a limitation over in fee, the feoffee or donee will hold of the superior lord, by the same services which the feoffor was bound to perform to him; from which it follows, that upon a conveyance of this kind, no rent service can be reserved to the feoffor or donor, because he has no reversion left in him; and as the feoffee or donee does not hold of him, he is not bound to do him fealty. But, if upon a conveyance in tail or for life, the donor keeps the reversion, and reserves to himself a rent, it will * be a rent service, because fealty and a power of * 273 distress are incident to such reversion. (*a*)

6. Where a rent was granted out of lands by deed, the grantee had not power to distrain for it, because there was no fealty annexed to such a grant. To remedy this inconvenience, an *express power of distress* was inserted in the grant, in consequence of which it was called a *rent charge*, because the lands were charged with a distress, for the recovery of the rent. (*b*) [2]

7. Rent charges are of great antiquity, and were probably first granted for the purpose of providing for younger children. They were, however, considered as contrary to the policy of the common law, for the tenant was thereby less able to perform the military services to which he was bound by his tenure; and the grantee of the rent service was under no feudal obligations of service; therefore, a rent charge was said to be against common right.

8. A *rent charge* may now be *created* either *by grant*, or by means of the *statute of Uses*. For it is enacted by that statute, ss. 4 & 5, that where divers persons stood and were seised of and in any lands, &c. in fee simple or otherwise, to the use and intent that some other person or persons should have an annual rent out of the same, and in every such case the same persons,

(*a*) Tit. 2, c. 1, s. 19. (*b*) 1 Inst. 143 b.

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[1] This statute was never held in force in *Pennsylvania*; but a rent, reserved to the grantor and his heirs, upon an alienation in fee, is there deemed a valid rent service, and not a rent charge; and, therefore, a release of part of the land from the service of rent does not extinguish the whole, but it shall be apportioned. See Ingersoll *v.* Sargent, 1 Whart. 337; where the law on this subject is ably reviewed by Kennedy, J.

[2] If a rent be granted to A and his heirs, to issue out of a freehold for lives and a term of years, and the freehold afterwards expires, the rent charge does not thereby alter its character, and become a chattel interest. Richardson *v.* Nixon, 2 Jon. & Lat. 250.

their heirs and assigns, that had such use and interest to have any such annual rents, should be adjudged to be in possession and seisin of the same rent, of and in such like estate as they had in the use of the said rent. (*a*)

9. Lord Bacon, in his Reading on this statute, observes, that in consequence of the words "were seised," a doubt had arisen whether the statute was not confined to rents in use at the time; but that this was explained in the following clause:—"As if a sufficient grant or other lawful conveyance had been made and executed to them by such as were or should be seised to the use or intent of any such rent, to be had, made, or paid according to the very trust and intent thereof." (*b*)

10. A *rent granted for equality of partition* between two coparceners is called a rent charge, of common right, because the coparcener has given a valuable consideration for it. A rent granted in lieu of lands upon an exchange, is of the same nature; as also a rent granted to a widow, out of lands of which she is dowable, in lieu of dower. (*c*)

274* *11. A *rent seck*, or barren rent, is nothing more than a rent for the recovery of which *no power of distress* is given, either by the rules of the common law, or the agreement of the parties.

12. Although every species of rent is comprised in the preceding divisions, yet there are some rents which are known by particular names. Thus, the certain established rents of the freeholders and ancient copyholders of manors, are called *rents of assise*. Those of the freeholders are also frequently called *chief rents*, *redditus capitales;* and both sorts are indifferently denominated *quit rents*, *quieti redditus*, because thereby the tenant goes quit and free of all other services. (*d*)

13. A *fee farm rent* is a perpetual rent reserved on a conveyance of lands in fee simple; and Lord Coke says, if a rent be to the whole value of the land, or to the fourth part of its value, it is called a fee farm. But Mr. Hargrave has observed on this passage that the true meaning of a fee farm is *a perpetual farm or rent*, the name being founded on the perpetuity of the rent or service, not on the *quantum;* that the sometimes confining the

(*a*) Tit. 11, c. 3. (*b*) Rivett *v.* Godson, tit. 32, c. 10.
(*c*) Lit. s. 252. Gilb. Rent. 19. 1 Inst. 169 a.
(*d*) 2 Inst. 19. (Marshall *v.* Conrad, 5 Call, 364.)

term fee farm to rents of a certain value, probably arose, partly from the statute of Gloucester, which gives the *cessavit*, only where the rent amounts to one fourth of the value of the land; and partly from its being most usual, on grants in fee farm, not to reserve less than a third or fourth of such value. (*a*)[1]

14. After the statute *Quia Emptores*, granting in fee farm, except by the King, became impracticable; because the grantor, parting with the fee, is by the operation of that statute without any reversion; and without a reversion there cannot be a rent service. A perpetual rent may however be reserved on a conveyance of lands in fee simple; and if a power of distress and entry be given to the grantor, his heirs and assigns, the rent will be good as a rent charge, but not as a fee farm rent. (*b*)[2]

15. With respect to the mode of acquiring seisin of a rent, in the case of a *rent service*, the person entitled cannot acquire a *seisin in deed* before the rent becomes due; for nothing but the *actual receipt* of it will have that effect. As to a *rent charge*, the only mode of acquiring a *seisin in deed* of it, *when created by grant*, is by the *actual receipt* of the whole, or of some part of it; and formerly it was usual, where a freehold estate in a rent charge was created, to pay the grantee a penny in the name of *seisin of the rent. But where a rent is created *275 by means of a *conveyance to uses*, the grantee immediately *acquires a seisin by the words of the statute.* (*c*)

16. A rent must in general *issue out of lands or tenements of a corporeal nature*, whereto the grantee may have recourse to distrain. It could not, therefore, be formerly reserved out of an advowson in gross, tithes, or other incorporeal hereditaments; because, says Lord Chief Baron Gilbert, every incorporeal right, till by age it was formed into a prescription, did originally rise by grant from the Crown; and such grants seem to have been made for particular purposes; as the grant of a fair, to be under the protection of the lord; the grant of a common for the bene-

(*a*) 1 Inst. 143 b, n. 5. 2 Inst. 44. 2 Doug. R. 627, n.
(*b*) Bradbury *v.* Wright, 2 Doug. R. 624.
(*c*) Tit. 5, c. 1, § 9, 13, 14.

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[1] [Fee from rents still exist in Missouri. See Alexander *v.* Warrance, 17 Miss. (2 Bennett,) 228.]

[2] A rent charge, reserved upon a lease in fee, is an interest in land, which is bound by a judgment, and may be taken in execution as real estate. The People *v.* Haskins, 7 Wend. 463; Lillingston's case, 7 Rep. 39.

fit of the beasts of all the tenants. Therefore, to let such incorporeal inheritances for rent, was esteemed contrary to the design and purposes of such grants. (*a*)

17. A rent *cannot be reserved out of a rent;* therefore if a person grants lands in tail, rendering rent, and after grants the rent for life, or in tail, rendering rent, this is a void reservation, because it passes as a rent seck. (*b*)

18. If A has a rent service or rent charge, and grants it to another for term of life, by deed indented, rendering to A a certain rent, the reservation is void; because rent cannot be charged with other rent; for it cannot be put in view. (*c*)

19. Where a *lease* is made of the *vesture or herbage of land*, a rent may be reserved; because the lessor may come upon the land to distrain the lessee's beasts feeding thereon. (*d*)

20. A rent may be reserved upon a *grant of an estate in remainder or reversion;* for though the grantee cannot distrain during the continuance of the particular estate, yet there will be a remedy by distress, whenever the remainder or reversion comes into possession. (*e*)

21. Where a person grants a *future interest in lands*, as a lease for years to commence *in futuro*, he may *reserve a rent immediately;* for it will be a good contract to oblige the lessee, and to ground an action of debt; and the lessor may have his
276 * *remedy by distress for the arrears, when the lessee comes into possession. (*f*)

22. It should be observed, that if a lease be made of an *incorporeal hereditament*, reserving rent, *such reservation is good to bind the lessee*, by way of *contract;* for the non-performance of which the lessor shall have an action of debt; because if the lessee undertake to pay an annual sum by his deed, such undertaking gives the lessor a right to it; and the law in all cases gives remedies adequate and correspondent to every man's right. (*g*) [1]

(*a*) 1 Inst. 47 a, 142 a. *Ante*, § 2. · Gilb. Rent, 20, 22. (Buszard *v.* Capel, 8 B. & C. 141.)

(*b*) 2 Roll. Ab. 446. (*c*) Keilw. 161. (*d*) 1 Inst. 47 a.

(*e*) Idem. (*f*) 2 Roll. Ab. 446.

(*g*) Windsor *v.* Gover, 2 Saund. 302. (Dubitofte *v.* Curteene, Cro. Jac. 453.)

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[1] Where the owner of a house which he had mortgaged in fee, afterwards let it *with the furniture*, to a stranger; and becoming bankrupt, he again, with the assent

23. A rent may be reserved to the King out of an incorporeal hereditament; because, by his prerogative, he may distrain for such rent on all the lands of his lessee. And as he has a remedy, there is, therefore, no reason that such a reservation should be void. (*a*)

24. With respect to the conveyances upon which a rent can be reserved, it may be laid down as a general rule that a *rent may be reserved upon every conveyance which either passes or enlarges an estate;* for rent being a return for something given, it follows that whenever an estate passes, there may be a return. (*b*)

25. Rents are most usually reserved on leases; but a rent may also be reserved on a *release*, a *bargain and sale*, *covenant to stand seised*, and *lease and release.* (*c*)

26. There may be *several reservations* of several rents, *in the same conveyance.* As where a lease was made of three manors, reserving for one a rent of £6, for another a rent of £5, and for the third a rent of £10, with a condition of reëntry into the whole, for non-payment of any part; it was held that these several reservations of rent created several tenures, demises, reversions, and rents. (*d*)

27. A tenant in tail of C. leased the site and demesnes of the manor, together with the manor itself, and all lands to the same belonging, for 21 years, rendering for the site therewith letten £6 6*s.* 8*d.*, and rendering for the said manor and premises therewith letten £9 10*s.* It was resolved that these were several reservations. (*e*)

28. A lease was made of three manors, *viz.*, D., E. and F., reserving for D. £5, for E. £10, and for F. £10, upon condition

(*a*) 1 Inst. 47 a, n. 1. 1 P. Wms. 306.
(*b*) 1 Inst. 144 a. Gilb. Rents, 22.
(*c*) Tit. 32, cc. 9, 10, 11.
(*d*) Winter's case, 2 Roll. Ab. 448.
(*e*) Tanfield *v.* Rogers, Cro. Eliz. 340.

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of his assignees, let it as a ready-furnished house to a tenant, who was afterwards required by the mortgagee to pay the rent to him; it was *held*, that the assignees might recover for the use of the furniture; that the rent of the house and furniture might be apportioned; or, if not, that upon the entry of the mortgagee, claiming the rent of the house, but having no interest in the furniture, the jury might infer a new agreement on the part of the tenant, to take the house from the mortgagee, at a reasonable rent, and to pay the assignees a reasonable compensation for the use of the furniture. Salmon *v.* Matthews, 8 M. & W. 827.

that if the said rents, or any of them, or any part thereof,
277 * were * behind, the lessor might reënter into all. The lessor sold the reversion of one of the manors to one W., and afterwards sold him the reversion of the other two manors. The rent being in arrear for one manor, the purchaser entered into all three. Adjudged that his entry was not lawful; for though the words were joint, yet the reservation and the rents were several. (*a*)

29. A. seised of Whiteacre, Blackacre, and Greenacre, leased all three to J. S. for 90 years, rendering for Blackacre 3*s.* 4*d.*, for Whiteacre 10*s.*, and for Greenacre, 20*s.* quarterly; with a clause of reëntry, if any part or parcel of the said rent should be behind, &c. W. R. purchased the reversion of Blackacre, brought an ejectment for 10*s.*, being a quarter's rent, and had judgment; these being several reservations and conditions. A difference was taken between this and Winter's case, the rent in that being originally entire, whereas here it was originally several; and in that case the condition was, that if any part of the rent was behind, the lessor should reënter into the whole. (*b*)

30. But where there is one reservation of rent in gross at first, though it be afterwards divided and severed into different parts, yet it will be one entire rent.

31. The prior of St. John made a lease of divers houses for years, yielding the yearly rent of £5 10*s.* 11*d.*; viz., for one house £3 0*s.* 11*d.*, for another 20*s.*, and for the other houses several rents, residue of the said rent; with a condition, that if the said rent of £5 10*s.* 11*d.* was behind in part, or in all, then the prior and his successors should reënter. Resolved, that this was one reservation of the rent in gross, at the first; and the viz. afterwards did not make a reservation of it, but was rather a several declaration of the several values of each parcel; by which it appeared how, and at what rates, the whole rent was reserved. (*c*)

32. In the above case, Roodes, Justice, said:—"If two tenants in common make a lease upon condition, rendering rent; the law will construe the demise, the condition, and the

(*a*) Lee *v.* Arnold, 4 Leon. 27.
(*b*) Hill's case, 4 Leon. 187. *Ante*, § 26.
(*c*) Knight's case, 5 Rep. 54.

rent, to be several; because the tenants in common have several reversions." (*a*)

33. With respect to *the persons to whom a rent may be reserved*, Littleton lays it down as a certain rule that no *rent service* can be reserved, upon any feoffment, gift, or lease to any *person but the *feoffor*, *donor*, or *lessor*, or to their *278 heirs; and in no manner to a stranger. The reason of this rule is, because the rent being payable as a return for the possession of the land, can only be reserved to the person from whom the land passes. And as there can be no reservation of rent service to a stranger during the life of the lessor, neither can a rent service be reserved, after the death of the lessor, to any person but the reversioner; for to him the land would belong, if it were not demised. (*b*)[1]

34. If a person makes a lease, to commence after his death, reserving rent *to his heirs;* this will be deemed a good rent service, arising to the heir, not by way of purchase, but as incident to the reversion, descending to the heir; and therefore may be released by the ancestor, during his life; which it would not be if it was a new purchase in the heir. (*c*)

35. But where a father and his son and heir apparent demised lands for years, to begin after the death of the father, rendering rent to the son: the father died, the lessee entered, and the rent being behind, the son distrained. Resolved, that this reservation of rent was utterly void; for although the son did prove heir, it bettered not the case by the event; but the reservation should have been to the heir or heirs of the lessor, by that name; for that was the only word of privity in law requisite in the reservation of rents; the heir being *eadem persona cum antecessore.* (*d*)

(*a*) Moo. 202.

(*b*) Lit. s. 346. (Prescott *v.* De Forest, 16 Johns. 159. Cornell *v.* Lamb, 2 Cowen, 652.) Gilb. Rents, 61.

(*c*) 2 Roll. Ab. 447. 2 Saund. 370. (*d*) Oates *v.* Frith, Hob. 274.

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[1] A purchaser of the reversion at a sheriff's sale, is entitled to the rent which becomes payable after the execution and acknowledgment of the deed. Bank of Pennsylvania *v.* Wise, 3 Watts, 394. And see Burden *v.* Thayer, 3 Met. 76; Birch *v.* Wright, 1 T. R. 378.

If the lessee covenant to pay the accruing rents to the creditors of the lessor, in discharge of their respective claims, the lessor has no right of distress. Ege *v.* Ege, 5 Watts, 134.

36. Where a rent is *reserved generally*, without specifying to whom it shall be paid, it will *go to the lessor;* and after his death to the person who would have inherited the land, if no such lease had been made.[1] If the reservation be to the lessor and his heirs, the effect will be the same, provided the lessor was seised in fee. (*a*)

37. A tenant in special tail leased for years, reserving a rent to himself, his heirs and assigns;—the question was, to whom it should go, after the death of the lessor; the estate having descended to a person who was not heir at law to the lessor. Lord C. B. Widdrington laid down the following points:—1. Where no person in particular is named to receive the rent, it shall go to the heir, together with the reversion; but where the lessor particularizes the persons, there the law will carry it further, for the agreement of the parties prevents the
279* *construction of law. 2. Where the reservation is special, and to improper persons, there the law follows the words. 3. Where the words are general, they will be expounded according to law. Resolved, that the rent should go with the reversion to the special heir in tail, though it was reserved to the heirs generally; for the word *heir* should be taken in that sense which would best answer the nature of the contract; which was, that those who would have succeeded to the estate, if the lease had not been made, should enjoy the rent. (*b*)

38. If a rent be reserved to the *lessor and his assigns*, it will determine at his death; for the reservation is good only during his life. So if a rent is reserved to *him and his executors*, he having the freehold, it will determine at his death; because the reversion to which the rent is incident, descends to the heir. But if a lease be made of a term of years, reserving rent to the lessor and his heirs, it will determine by the death of the lessor; for the heir cannot have it, as he cannot succeed to the estate, being only a chattel; and the executor cannot have it, there

(*a* 1 Inst. 47 a. (*b*) Cother *v.* Merrick, Hard. 89.

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[1] [Jaques *v.* Gould, 4 Cush. 384. And if a lease for years, which terminates by the death of the lessor, contains a covenant on the part of the lessee to pay the rent reserved, and for such further time as he may hold the premises, and he holds over after the death of the lessor, he will be liable to pay the rent subsequently accruing in the same manner as if the lease did not terminate on the lessor's death. Ibid.]

being no words to carry it to him: [but otherwise, if reserved during the term.] (*a*)

39. Where a rent was reserved to the lessor, his executors, administrators, and assigns, yearly, *during the term*, it was resolved, that it should go to the heir of the lessor; for although there was no mention of the heirs in the reservation, yet there were words which evidently declared the intention of the lessor, that the payment of the rent should be of equal duration with the lease; the lessor having expressly provided that it should be paid during the term; consequently, the rent must be carried over to the heir, who came into the inheritance after the death of the lessor, and would have succeeded in the possession of the estate, if no lease had been made. And if the lessor had assigned over his reversion, the assignee would have the rent as incident to it; because the rent was to continue during the term, and must therefore follow the reversion, since the lessor made no particular disposition of it, separate from the reversion. (*b*)

40. Where *no reversion is left in the lessor*, and the rent is reserved to his executors, administrators, and assigns, it will go to them, and not to the heir.

41. A tenant for three lives, to him and his heirs, assigned over his whole estate, reserving to himself, his executors, *administrators, and assigns, a rent of £10, with a proviso, *280 that upon non-payment the assignor and his heirs might reënter; and the assignee covenanted to pay the rent to the assignor, his executors, and administrators. The question was, whether this rent should go to the heir or executor of the assignor. It was decreed by Sir J. Jekyll, that the rent should go to the executor, as it was reserved to him; and there was no reversion left in the assignor, to which the rent was incident, so as to carry it to the heir. It was also held, that the covenant to pay the rent to the executors and administrators of the assignor was good and binding, both in law and equity. And though the proviso was, that in case of non-payment of the rent, the assignor and his heirs might reënter, yet the Court thought this immaterial; as in equity the heir must, in this case, be looked upon as a trustee for the executor.

(*a*) 1 Inst. 47 a. Wooton *v.* Edwin, 12 Rep. 36. 1 Vent. 161, 162.
(*b*) Sacheverell *v.* Froggatt, 2 Saund. 367.

This case came on again before Lord King, who was of opinion, that there being no reversion, the rent might be well reserved to the executors, during three lives; and decreed accordingly. (*a*)

42. Lord Coke says, if tenant for life and the person in reversion join in a lease for life, or gift in tail, by deed, reserving a rent, this shall enure to the tenant for life only during his life, and after his death to the person in reversion. (*b*)

43. It is said, in Chudleigh's case, that if a feoffment in fee be made to the use of one for life, and after to the use of another in tail, with remainder over, with power to the tenant for life to make leases, so that he reserve the best accustomed rent, payable to all those who would have the reversion; if tenant for life makes leases, pursuant to his power, the lessees derive their interest out of the first feoffment. How then can the reservation of the rent be good; and how could his heir, or he in remainder, come at it? (*c*)

This doubt appears to be removed by the following determination: —

44. Thomas Lovet levied a fine, to the use of himself for life, after his decease to his executors for twelve years, remainder to his first and other sons in tail, remainder over, with a power to T. Lovet to make leases, not exceeding ninety-nine years. T. Lovet made a lease for sixty years, rendering annually to himself during the term, and after his decease to such 281* person and persons * to whom the reversion or remainder of the premises should, from time to time, belong, by the said limitation of uses, the sum of £3. It was agreed by the Court, that the lease was good enough, and that the rent was distrainable by those in remainder, as they happened to be immediate to the lease. (*d*)

45. W. Whitlock, being tenant for life, under a declaration of uses of a fine, remainder to his son in tail, remainder over, with a power of leasing, demised the premises, reserving rent to himself, his heirs and assigns, and to such other person or persons as should be entitled to the inheritance of the said premises after his decease. It was objected, that this reservation was void;

(*a*) Jenison *v.* Lexington, 1 P. Wms. 555.
(*b*) 1 Inst. 214 a, n. 1.
(*c*) 1 Rep. 139 a.
(*d*) Harcourt *v.* Pole, 1 And. 273.

as rent could only be reserved to the lessor, donor, or feoffor, and their heirs, and not to persons only privies in estate, as remainder men and reversioners. But it was resolved that the reservation was good; that if a reservation had been to the lessor, and to every person to whom the inheritance or reversion of the premises should appertain during the term, it would have been good; for the law would distribute it to every one to whom any limitation of the use should be made. And it was agreed, that the most clear and sure way was to reserve the rent yearly during the term, and leave the law to make the distribution, without an express reservation to any person. (*a*)

46. With respect to the *time when rents are payable*, it is either by the particular appointment of the parties in the deed, or else by appointment of law. But the law never controls the express appointment of the parties, where such appointment will answer their intention.[1]

47. Where rent is reserved *generally*, it is *payable at the end of the year;* but if it be reserved *annuatim durante termino*, the first payment to begin two years after, this will control the words of reservation. (*b*)

48. If a rent be made payable at the two most usual feasts, without specifying them, the law will construe this to mean Michaelmas and Lady-day; because those are the days usually appointed for such payments. And if a lease be made reserving rent at the two usual feasts, without saying by equal portions, the rent shall notwithstanding be paid by equal portions. (*c*)

49. If a lease be made for years, provided the lessee shall pay £10 at Michaelmas and Lady-day, by even portions, during the term, though the word *annually* be omitted, yet the law *will construe it to be so; because it is made payable *282 during the term. (*d*)

50. If a lease be made on the first of May, or at any other

(*a*) Whitlock's case, 8 Rep. 69.
(*b*) 3 Buls. 329.
(*c*) Harrington *v.* Wise, 2 Roll. Ab. 450.
(*d*) Id. 449.

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[1] [Premises were leased for a year at a stipulated rent, payable in merchandise at the market price, every three months during the year, or at any time the same was due. Held, that unless a demand was made, the rent did not become due until the end of the year; but that it could be made to become due quarterly, by a proper demand of each quarter's rent. Stowman *v.* Landis, 5 Ind. (Porter,) 430.]

time, reserving rent, payable quarterly; this shall be intended quarterly from the date of the lease, and not at the usual feasts. (*a*).

51. A lease was made for twenty years, reserving rent during the term, payable at Michaelmas and Lady-day, or within thirteen weeks after every of the said feasts. Resolved, that the rent was not payable till the end of the thirteen weeks; the disjunctive being evidently added for the benefit of the lessee. (*b*)

52. In a subsequent case, a tenant for life made a lease for twenty-one years, rendering rent at Michaelmas and Lady-day, or within thirteen weeks of any of the said feasts. After Michaelmas, before the thirteen weeks past, the tenant for life died, and his executors brought an action of debt for the rent. It was adjudged that the action did not lie; for the rent being to be paid at Michaelmas or thirteen weeks after, the lessee had his election to pay it at any of the days; and before the last day it was not due. If the rent had been reserved at Michaelmas, and if it was behind for thirteen weeks, then that it should be lawful for the lessor to reënter; the rent would have been due at Michaelmas, the thirteen weeks being but a dispensation of the entry. (*c*)

53. Where a lease ends at Michaelmas, and the rent is payable on that day, or within ten days after, the last payment is due at Michaelmas, without any regard to the ten days; the rent being due for the last year, though the year expired before the ten days. For the reservation being annually during the term, at the said feasts, or within ten days, it should be expounded, according to the contract, at the end of every ten days during the contract; but the term ending at Michaelmas, so as there could not be ten days after, the law will reject the ten days after the last feast, for that cannot be; and then it was due at the feast according to the contract of the parties. (*d*)

54. A lease was made of tithes, from February, 1661, to Michaelmas, 1668, reserving rent at Lady-day and Michaelmas, or within twenty days after each feast, during the term. An action was brought for the rent which became due at
283 * Michaelmas, *1668; to which the defendant demurred,

(*a*) Id. 450.
(*b*) Clun's case, 10 Rep. 127.
(*c*) Glover *v.* Archer, 4 Leon. 247.
(*d*) Barwick *v.* Foster, Cro. Jac. 288, 310.

because the last Michaelmas-day was not within the term. Held by Twisden, that in contracts the intent is sufficient, and that Michaelmas-day must here be taken to be inclusive. (*a*)

55. The right to a *rent service* is *real property*, and descendible to the person entitled to the reversion of the lands out of which it issues. But *from the moment* that a payment of rent *becomes due*, it is then *personal property;* therefore, where the person entitled to a rent service, outlives the day on which it becomes due, it will go to his executor or administrator; but if the lessor dies on the day preceding the day of payment, the rent will go to the heir, as incident to the reversion. (*b*)[1]

56. Although rent *must be demanded at sunset of the day on which it is payable*, if the lessor intends to *take advantage of a condition;* yet rent is *not due till the last minute of the natural day.*[2] In the case of leases made by *tenants in fee*, or

(*a*) Biggin *v.* Bridge, 3 Leon. 211. 3 Keb. 534. (*b*) (3 Met. 78.)

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[1] [Stinson *v.* Stinson, 38 Maine, (3 Heath,) 593; Van Wicklen *v.* Paulson, 14 Barb. Sup. Ct. 654; Crosby *v.* Loop, 13 Ill. 625; Sherman *v.* Dutch, 16 Ib. 283.]

[2] The common law on this subject is stated by Sergeant Williams in the following propositions:—"Where there is a condition of reëntry reserved for non-payment of rent, several things are required by the common law to be previously done by the reversioner, to entitle him to reënter. 1. There must be a *demand* of the rent. 2. The demand must be of the *precise rent due*; for if he demands a penny more or less, it will be ill. 3. It must be made *precisely upon the day* when the rent is due and payable by the lease, to save the forfeiture. 4. It must be made *a convenient time before sunset.* 5. It must be made *upon the land*, and at *the most notorious place* on it. Therefore, if there be a *dwelling-house* upon the land, the demand must be at the front or fore door; though it is not necessary to enter the house, notwithstanding the door be open. But if the *tenant meet the lessor*, either *on or off* the land, *at any time* of the last day of payment, and *tender* the rent due, it is sufficient to save a forfeiture; for the law leans against forfeitures. 6. Unless *a place is appointed* where the rent is payable; in which case the demand must be made at such a place. 7. A demand of the rent must be *made in fact*, and so averred in pleading, although there should be no person on the land ready to pay it. 8. If, after these requisites have been performed by the reversioner, the tenant neglects or refuses to pay the rent, then the reversioner is entitled to reënter. However, it is to be observed, that *no actual entry* is necessary to be made by him into the land, but it is sufficient to bring an *ejectment* only. It follows as a necessary inference from what has been premised, that a demand made *after* or *before* the last day which the lessee has to pay the rent in order to prevent a forfeiture, or *off the land*, will not be sufficient to defeat the estate."

"If the lessor, *after notice of the forfeiture*, which is a material and issuable fact, accepts rent which accrued due after, or does any other act which amounts to a dispensation of the forfeiture, the lease, which was before voidable, is affirmed. But if there be a lease for years, with a condition that, for non-payment of the rent, or the like, the

under a power, if the lessor dies on the day of payment, but before midnight, the rent will go along with the land to the heir, or the person in remainder or reversion; because the lessee has till the last instant to pay his rent; consequently, the lessor dying before it was completely due, his personal representatives can make no title to it. (*a*)

57. But where a lease is made by a bare *tenant for life*, which *determines at his death*, there, if the person entitled to the rent lives to the *beginning* of the day on which it is payable, it will vest in his personal representative.

58. A term of five hundred years was created for securing a rent charge of £200 a year to Lady Cole for her life. Lady Cole died at nine o'clock of the night of Michaelmas-day, on which day the rent was payable. The question was, whether the term

(*a*) 1 Saund. 287, n. 16.

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lease *shall be null and void,* if the lessor makes a legal demand of the rent, and the lessee neglects or refuses to pay, or if the lessee is guilty of any other breach of the condition of reëntry, the lease is absolutely determined, and cannot be set up again by acceptance of rent due after breach of the condition, or by any other act. But if, in such a lease, the clause be, that for non-payment of the rent *it should be lawful for the lessor to reënter*, the lease is *only voidable,* and may be affirmed by acceptance of rent due after, or other act, if the lessor had notice of the breach of the condition at the time. So, where the condition for reëntry is *for non-payment of rent,* and the lessee does not pay it upon demand, yet if the lessor afterwards *distrains*, though *for the same rent* for which the demand was made, he has affirmed the lease; for he thereby admits the continuance of it, because, at common law, no distress can be made after the lease is determined." See Duppa *v.* Mayo, 2 Saund. 287, note (16) by Williams, and the authorities there cited. See also 1 Swanst. 342, note; Bro. Abr. Tender, pl. 41; Ibid. Entry Congeable, pl. 90; Year Book, 6 H. 7, 3. b.; Chalker *v.* Chalker, 1 Conn. R. 79; Wade's case, 5 Rep. 114; Wing *v.* Davis, 7 Greenl. 31; Tinckler *v.* Prentice, 4 Taunt. 549.

The doubt and uncertainty in which this subject has sometimes been enveloped, may be cleared by attending to the distinction between the right to demand payment, or to make tender of the money, and the right of action. Demand of payment must be made on the day when the money falls due, and at a reasonable hour; and this, in the case of rent, must be at sunset, where a forfeiture is the consequence of non-payment. And for the like reason, a tender must be made at or before sunset, in order that there may be certainty of light enough to count and examine the money or things tendered. Without such demand, no right of action accrues until the last day has fully expired; namely, at midnight. But the right to commence an action for the money may be completely vested during the last day of payment, by a demand of payment at any reasonable hour. See Leftley *v.* Mills, 4 T. R. 170; Greeley *v.* Thurston, 4 Greenl. 479; Lunt *v.* Adams, 5 Shepl. 230; Staples *v.* The Franklin Bank, 1 Met. 43, where all the authorities on this point, as applicable to promissory notes, are collected and reviewed. See also Perry *v.* Aldrich, 13 N. Hamp. Rep. 343. [And Thomas *v.* Hayden, cited in 19 Vt. (4 Washb.) 587.]

was void without payment of this quarter's rent; or whether this quarter's rent remained due to Lady Cole, so as to entitle her administrator thereto. Mr. Justice Tracy was of opinion that the rent was due, when by law it ought to be paid; therefore, since Lady Cole lived beyond sunset, which was the time when the money was demandable, and to be paid by the tenant upon pain of forfeiting his lease, he thought the money was due to her, and ought to be paid to her administrator. (*a*)

*59. Sir Henry Johnson was tenant for life, with remainder to Lady Wentworth. Sir H. Johnson made leases for years, reserving the rent at Lady-day and Michaelmas, and died on Michaelmas-day about twelve o'clock at noon. The question was, whether these rents belonged to the executor of Sir Henry Johnson, or to Lady Wentworth; or whether the tenants should retain them. *284

Lord Macclesfield decreed, that as to those leases which determined on the death of Sir H. Johnson, the rents belonged to his executors; because, though for the benefit of the tenants, they had till the last instant of Michaelmas-day to pay the rents, yet the reservation being on Michaelmas-day, as soon as that day began, they were at their peril to take care that they were paid accordingly. But as to the leases made by virtue of a power, they still had existence; therefore the tenants had till the last instant of the day to pay the rent: then, when the lessor died before, the rent went along with the reversion, to the person who was entitled to it. (*b*)

60. Sir James Oxenden, before marriage, settled an estate on his lady, the plaintiff, for her life, with a power to himself to make leases. Sir J. O. made leases pursuant to his power, reserving the rent at Lady-day and Michaelmas; and died upon Michaelmas-day, between three and four o'clock in the afternoon, before sunset. One of the lessees paid his rent to Sir James Oxenden in the morning of the said Michaelmas-day: but the other tenants had not paid their rents. The question was, whether the rents which were not paid belonged to the executors of Sir J. Oxenden, or to the jointress.

It was decreed by Sir John Trevor, M. R., that the lessor dying before sunset, and there being no remedy for the lessor to

(*a*) Southern *v.* Bellasis, 1 P. Wms. 179. (Ex parte Smyth, 1 Swanst. 337, 343, n.)
(*b*) Strafford *v.* Wentworth, 1 P. Wms. 180. Prec. in Chan. 555. 10 Mod. 21.

recover these rents during his life, they should go to the jointress; and that the executors of Sir J. O. should also pay the rent which he received on the day of his death, to the jointress. But as to this last point there is a *query* by the reporter. (*a*)

61. [In the recent case of Norris *v.* Harrison, a tenant for life having granted leases in conformity with his power, died before midnight, though after sunset, on the rent day, and the remainder man was declared entitled to the rent.] (*b*)

62. Rent service is now sometimes apportioned between the executor of a tenant for life, and the remainder-man; of which an account will be given in the third chapter of this title.

285* *63. A *rent charge of inheritance* is also a *real property*, descendible to the heir. But from the moment that a payment of it *becomes due*, that payment is *personal property*, and will go to the executor or administrator.

64. With respect to the *remedies for the recovery of rents*, there are several sorts, of which some are provided by the common law, some by particular statutes, and some by the express agreement of the parties.

65. Where a *rent service* is in arrear, the common law gives to the person in reversion a right to enter on the lands, to seize the cattle, and other personal chattels found there, and to sell them for the payment of the rent; which is called a *distress*.[1]

(*a*) Rockingham *v.* Penrice, 1 P. Wms. 178. See 1 Swans. 345, note; ib. 338, &c.
(*b*) 2 Mad. 268.

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[1] To entitle the landlord to distrain, the rent must be certain, or capable of being made certain. It may be either in money, or in services. Thus, to shear all the sheep depastured within the manor, is sufficiently certain. 1 Inst. 96 a. So, if the sum be certain, with an agreement that the tenant may pay it by making repairs and improvements. Smith *v.* Colson, 10 Johns. 91; Smith *v.* Tyler, 2 Hill, N. Y. Rep. 648. And see Valentine *v.* Jackson, 9 Wend. 302; Fry *v.* Jones, 2 Rawle, R. 11; Price *v.* Limehouse, 4 McCord, 546. [Rent payable in any thing susceptible of valuation is the subject of distress. Fraser *v.* Davie, 5 Rich, Law, 59.]

Whether a share in all the grain raised is sufficiently certain for this purpose, *quære.* Warren *v.* [illegible]y, 13 S. & R. 52. [Such share is not sufficiently certain. Bowzer *v.* Scott, 8 Blackf. 86.] So, as to rent payable *in advance.* Diller *v.* Roberts, Ibid. 60. [So where personal and real estate are leased by the same instrument, and no means are afforded for apportioning the compensation to be paid to each kind, there can be no distress for non-payment; but where the amount of rent reserved for real estate can be ascertained, the landlord may claim that amount out of the proceeds of the sale, by the sheriff, of the personal property on the premises leased. Commonwealth *v.* Coutner, 18 Penn. State R. (6 Harris,) 439. A landlord, by accepting administration of

66. If a person holds lands of the King, by the payment of rent, and the rent is in arrear, the King may distrain in any

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the tenant's estate, waives his right to distrain. Hovey *v.* Smith, 1 Barb. Sup. Ct. 372; and loses it by a surrender of the term. Greidler's Appeal, 5 Barr, 422.]

But a formal lease in writing is not necessary; a parol lease, valid under the statute of frauds, is sufficient. Cornell *v.* Lamb, 2 Cowen, 652. Knight *v.* Bennett, 3 Bing. 361. Jacks *v.* Smith, 1 Bay, 315. Smith *v.* Shff. of Charleston, Ibid. 443.

[Cattle, taken to be pastured for hire by a tenant, are not liable to distress for rent. Cadwalader *v.* Tindall, 20 Penn. (8 Harris,) 422; nor are goods while on the premises of an auctioneer for the purposes of sale by auction. Brown *v.* Arundell, 1 Eng. Law and Eq. 373; Williams *v.* Holmes, 20 Ib. 370; nor those of a sub-lessee; Gray *v.* Rawson, 11 Ill. 527.

A landlord, in order to distrain, may open the outer door in the ordinary way in which other persons using the building are accustomed to open it. And where the door of a stable was kept closed by a padlock attached to a movable staple, and the owner and other persons usually opened the door by pulling out the staple, such fastening being used to keep the door closed and not to keep people out, it was held, that a distress upon such goods in the stable, after an entry in this mode, was legal. Ryan *v.* Shilcock, 8 Eng. Law and Eq. R. 503; Dent *v.* Hancock, 5 Gill, 120. But a landlord may not break open a stable, though without the curtilage, in order to make a distress. Brown *v.* Glenn, 2 Ib. 275; nor a door forcibly which is barred or bolted, though property be fraudulently deposited in the house to prevent a distress. Dent *v.* Hancock, 5 Gill, 120.]

In regard to distresses for rent in this country, and the principles on which they are founded, Mr. Dane makes the following observations:—" According to Dr. Sullivan, all *rent services* were *feudal* rents, and *distrainable;* but there is another species of rent not distrainable, called in the English law, *rents seck,* not feudal; these are when a man grants rent out of his land to a stranger; the grantor is bound by his grant, but the grantee not being his lord, cannot distrain; 'for the remedy by distress being substituted in the place of the lord's right of entry, cannot be extended to a stranger, who never had that right of entry; and this was, originally, the only kind of *rent seck.* But the statute *quia emptores,* introduced another species of rent, not distrainable; this was by converting *rent services* into *rent seck;* the liberty of alienation without the lord's consent having been allowed before that statute was enacted, it became customary for a tenant, who sold his land, and parted with his *whole* estate in it, to reserve the tenure of the *vendee,* not to the superior lord and his heirs, but to himself and his heirs;' whereby the grantor retained many feudal benefits to himself and his heirs. Now, says Dr. Sullivan, 'a rent upon such a sale to the vendor, was, as he continued the vendee's lord, a *rent service,* and consequently distrainable;' cites Coke upon Lit. lib, 2, ch. 12; but as this was hurtful to the whole military policy, and not very consistent with feudal subordination, that statute, *quia emptores,* was enacted, and provided that when any man aliened his whole estate, the alienee should not hold of him and his heirs, but from the superior lord, and be his tenant, directly and by the same services by which the alienor had holden; hereby the alienor ceasing to be lord, and his right of reversion clearly gone, by force of this statute, if he reserved a rent on such alienation, he could not distrain for it, and it was a *rent seck.* Hence these *rents seck* came to be of two kinds, one arising by *grant,* the most ancient, the other by *reservation,* when a man aliened his whole estate; 'for if the whole estate was not gone, but *a rever-*

other lands or tenements of the tenant. This must, however, be understood of such other lands as his tenant has in his own

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sion remained in him, a rent reserved was still, on account of that reservation, a *rent service;* as if A gave lands to B, and the heirs of his body, reserving rent;' as this gift in tail to B left a reversion in A, such rent for that reason was distrainable, but if A had leased for life, or years, or made a gift in tail, and at the same time conveyed the remainder in fee, a rent reserved would have been a *rent seck.*

"The inconvenience attending *rents seck,* in their not being distrainable, gave existence to another and third kind of rents, called *rents charge.* 'These are *rents seck* armed with a power of *distress* by the especial agreement of the parties;' and are also by *grant* or *reservation.* Only the first existed before this statute, and was thus,—A granted out of his lands, keeping them still himself, a rent for years, life, fee tail, or fee simple, and gave his grantee a power to enter and distrain for the rent: by *reservation,* when A conveys his estate in fee simple, or fee tail, or leases for life, or years, with a remainder over in fee, and on such conveyance reserves a rent, and it is covenanted by the grantee that A shall have a right to enter and distrain for the rent. Though once doubted, it is now settled, a rent charge can be reserved by a *deed poll;* for the grantee of the estate, accepting the deed, shows his assent to take it on the terms contained in it; and whoever takes a benefit, must take it under such conditions, and those only, the donor intended. Of these three kinds of rent, only *rent service* is properly *feudal;* but by the *feudal* law, also, distresses were taken to oblige persons to appear in courts of justice; also to raise fines and amerciaments inflicted on them; this, too, arose from the *feudal* law and the obligation of fealty." He then proceeds to observe, that "From these general principles it is to be inferred that distresses for rent may be on three grounds in the United States, where the relation of *feudal lord* and tenant or vassal does not exist: 1. When given by *statute;* 2. When by *contract,* as in the cases of *rent charge* above; and 3, (not quite so clear) in cases of *rent service,* when the person entitled to the rent, has the reversion of the estate in him, and has a right of entry for non-payment, and as a substitute therefor, may take his distress, that is seize and hold as a pledge, till paid, some *movable* property found on the land, not of any of the five descriptions exempted by common law, usually enumerated and defined in the books. After all, our remedy is mainly by action, for use or occupation, or by covenant or debt." See 2 Dane, Abr. p. 451, 452.

Whether any reversionary interest is essential to the right to distrain for rent, is a question which is discussed with great ability and research, in the 8th volume of the North Am. Review, p. 233—262; the writer maintaining that for rent reserved upon a conveyance in fee simple, the grantor may distrain by the common law.

In the *New England States* the remedy by distress for rent is not used. It is recovered only by action, or by reëntry, where such right is reserved. Such also seems to be the remedy in *North Carolina, Michigan,* and *Ohio.* The remedy in *Tennessee, Arkansas, Alabama,* and *Missouri,* is by action, the landlord having a preferred lien on the annual crop, for the rent. [Givens *v.* Easley, 17 Ala. 385; see Knox *v.* Hunt, 18 Mis. (3 Bennett,) 243; and the lien is not impaired by the landlord's taking a note for the rent with surety. Denham *v.* Harris, 13 Alabama, 465. The landlord has no action against one who purchases the crop with notice of the lien. Bryan *v.* Buckholder, 8 Humph. (Tenn.) 561.] In *Illinois,* and in *Delaware,* it is by action or distress, with a similar lien. [Penny *v.* Little, 3 Scam. 301. The distress warrant cannot be executed in the night time. Sherman *v.* Dutch, 16 Ill. 283. In a proceeding of distress for rent,

actual possession, and are manured with his own beasts; but not in the possession of his lessee for life, years, or at will; for their beasts are not subject to such distresses. The grantee of a fee farm rent from the Crown has the same privilege. (*a*)

67. The remedy by distress has been extended, by several statutes,† [1] to the proprietors of what were formerly called rents seck, and also to rent charges; and also to the executors and administrators ‡ of the proprietors of such rents, [and *also rents reserved in leases for years] even after the *286 determination of the leases upon which such rents are reserved.[2]

(*a*) 2 Inst. 122. Att.-General *v.* Coventry, 1 P. Wms. 306.

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a landlord cannot mingle with or add to the amount due for rent, a claim on any other account; nor can the tenant set off any claim against the landlord, except payments of rent. Sketoe *v.* Ellis, 14 Ill. 75.] In most, if not all the other States, the remedy by distress is used, its exercise being regulated by statutes; the right of action also generally subsisting at law. [Distress for rent was abolished in New York, in 1846. Act 1846, ch. 274; see also Stocking *v.* Hunt, 3 Denio, 274; Guild *v.* Rogers, 8 Barb. Sup. Ct. 502.]

Rent in arrear is not assignable so as to give the assignee a remedy in his own name; it being but a chose in action. But rent not yet accrued is assignable; and a covenant to pay it runs with the land, and will pass to the assignee, who is thereby subrogated to the rights of the assignor. Demarest *v.* Willard, 8 Cowen, 206.

[1] The statute of 8 Ann. c. 14, sec. 9, by which grants of reversions are made effectual, without the attornment of tenants, is in force in Massachusetts. Burden *v.* Thayer, 3 Met. 78.

[2] For the remedy by replevin, to try the validity of a distress, see the valuable Practical Treatise on the Law of Replevin in the United States, by P. Pemberton Morris, Esq., recently published.

† [32 Hen. 7, c. 37. 8 Ann. 14. 4 Geo. 2, c. 28. 11 Geo. 2, c. 19. 57 Geo. 3, 52.]

‡ [Where the owner of the inheritance granted a lease for years, reserving rent, and died, his executor could not at common law, nor by the statute 32 Hen. 8, c. 37, distrain for the arrears of rent accrued in the lessor's lifetime; for the latter statute was confined to the representatives of persons dying seised of rents in fee, in tail, or for life. Prescott *v.* Boucher, 3 B. & Adol. 849; Jones *v.* Jones, Ib. 867. But now by stat. 3 & 4 Will. 4, c. 42, ss. 37, 38, the law is amended in the above respect. By the latter statute it is enacted that the executors or administrators of *any* lessor or landlord, may distrain upon the lands demised for any term or at will, for the arrearages due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime. And such arrearages may be distrained for after the determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined, provided such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; and all powers and provisions in the several statutes made relating to distresses for rent are made applicable to the distresses so made as aforesaid.]

68. It was formerly usual, where a feoffment was made, reserving rent, to insert a *condition in the deed* that if the rent was behind, it should be lawful for the feoffor and his heirs to *reënter and hold the lands* till he was satisfied for what was in arrear. This was held not to be a condition absolutely to *defeat* the estate; but that the feoffor on his entry should *hold the land as a pledge*, till he was paid his rent; and that the profits should not go in discharge of the rent, but should be applied to his own use.[1] Lord Coke, however, observes, that if the words of the condition were, that the feoffor should reënter and take the profits, till thereof he was satisfied; there the profits should be accounted as part of the satisfaction. (*a*)

69. The distinction when the profits taken by the lessor after entry are, and when they are not to be, in satisfaction of the rent, is not admitted in equity. For the Court of Chancery will always make the lessor account to the lessee for the profits of the estate, during the time of his being in possession; and will compel him, after he has satisfied the rent in arrear, and the costs attending his entry, and detention of the lands, to give up the possession to the lessee, and to pay him the surplus profits of the estate. (*b*)

70. In grants of *rent charges*, a *clause of entry* on the lands out of which the rent charge is granted is usually inserted;[2] in

(*a*) Lit. s. 327. (Farley *v.* Craig, 6 Halst. 270. 3 Call, 424.) 1 Inst. 203 a.
(*b*) Idem. n. 3.

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[1] Where the terms of the lease are, that in the case of the non-payment of rent the lease shall cease and determine, and that the landlord may reënter, it is held that an entry is necessary to re-vest the estate. Stuyvesant *v.* Davis, 9 Paige, 427.

If the landlord accepts rent which *accrued subsequent* to his entry for non-payment, the entry is waived and the lease continues. But his acceptance of the rent which *accrued previous* to the entry, is no waiver of the entry, by the common law; Jackson *v.* Allen, 3 Cowen, 220; but the tenant may be relieved, by stat. 4, Geo. 2, c. 28, § 2, against a forfeiture for non-payment of rent, by payment of the rent and costs within six months after judgment in ejectment against him. The principle of this statute having been adopted in practice in New Hampshire, long before its enactment, it is there held that an acceptance of the rent already accrued is a waiver of the entry for non-payment, even at law. Coon *v.* Brickett, 2 N. Hamp. 163. [Richburg *v.* Bartley, Busbee, Law, (N. C.) 418.]

[2] In *Georgia*, the right of entry for non-payment of rent is given by express statute without any clause of reëntry in the lease. Rev. St. 1845, ch. 16, § 85, p. 450. In *Vermont*, ejectment may be maintained by the landlord, in the like case, without proof of reëntry. Rev. St. 1839, ch. 35, § 14, p. 216.

consequence of which an interest vests in the grantee, whenever the rent charge is in arrear; which he or his assigns may reduce into possession by an *ejectment.* But the possession thus acquired is only till the grantee of the rent charge is satisfied his arrears out of the rents and profits of the land. (*a*)

71. In case of a *distress, no demand* of the rent is necessary; but where the remedy for the recovery of rent is by way of *entry,* there must be an *actual demand made, previous to the entry,* otherwise it is tortious; because a condition or power of entry is in derogation of the grant; and the estate at law being once defeated, it is not to be restored by any subsequent payment.[1] It is therefore presumed that the tenant is residing on the premises, in order to pay the rent, for the preservation of the estate, unless the contrary appears, by the feoffor's being there to demand it. So that unless there be a demand made, and the tenant thereby, *contrary to the presumption, appears not to be *287 on the land, ready to pay the rent, the law will not give the lessor the benefit of reëntry, to defeat the tenant's estate, without a wilful default in him; which cannot appear, unless a demand is actually made on the land. (*b*)

72. In the creation of *rent charges* a *right of entry* is now usually given by the operation of the *statute of Uses.* As if lands are conveyed to A, to the use, intent, and purpose that B may receive out of the lands so conveyed a certain annual sum or yearly rent charge; and to this further use, intent, and purpose, that if such rent charge be in arrear for a certain time, it shall be lawful for B and his assigns to enter upon and hold the land, and receive the profits thereof, till the arrears of the rent charge are satisfied. Here, as soon as the rent is in arrear, a use, derived out of the seisin of the trustee or releasee to uses springs up, and vests in the person to whom the power of entry is given, which is immediately transferred into possession, by the operation of the statute 27 Hen. VIII.: he has consequently a right to

(*a*) Jemmott *v.* Cooly, 1 Lev. 170. T. Raym. 135, 158. 1 Saund. 114.
(*b*) Gilb. Rent, 73. (McMurphy *v.* Minot, 4 N. Hamp. R. 251, 254.)

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[1] This rule is recognized in the United States, wherever it is not altered by statute. Connor *v.* Bradley, 1 How. S. C. Rep. 211; 17 Pet. 263, S. C.; Sperry *v.* Sperry, 8 N. Hamp. R. 477. In *Vermont,* it is abrogated by statute. Rev. St. 1839, ch. 35, § 14, p. 216.

take and keep that possession, till the purpose for which it is executed is satisfied; when the use determines. By virtue of this estate he may make a lease for years to try his title in ejectment, either to obtain possession of the land, if it be withheld from him, or to restore it, if it be disturbed or devested; and if he assigns over the rent charge, this right of entry and perception of the rents and profits of the lands, charged with the payment of it, will pass to the assignee. (*a*)

73. By the statute of 4 Geo. II. c. 28, s. 2, it is enacted, that every landlord, who by his lease has a right of reëntry in case of non-payment, when half a year's rent is due, and no sufficient distress is to be found, may serve a declaration in *ejectment* on his tenant, and affix the same on some notorious part of the premises; which shall be valid without any formal reëntry, or previous demand of rent: and that a recovery in such ejectment shall be final and conclusive, both in law and equity; unless the rent and all costs be paid within six calendar months after. (*b*) †

74. [It has recently been decided that tenants from year to year are not within the provisions of the above act.] (*c*)

288* *75. By the fourth section of this statute it is provided, that if the tenant, at any time before the trial in ejectment, pays or tenders to the lessor or landlord the whole rent in arrear, with the costs; or pays such arrears and costs into Court; the proceedings in ejectment shall cease and be discontinued. (*d*)

76. In most cases an *action of debt* may now be brought for rent. And in all modern leases wherein rent is reserved, a covenant is inserted, on the part of the lessee, to pay the rent; on which an *action of covenant* may be brought. (*e*) [1]

(*a*) Gilb. Rent, 137. Havergill *v.* Hare, Cro. Jac. 510. (Scott *v.* Lunt, 7 Peters, R. 596, 605.) Tit. 11, c. 3.

(*b*) 1 Saund. 287, n. See 7 East, 368. 1 Burr. 620. 7 Term R. 117.

(*c*) Doe *v.* Roe, 5 B. & Ald. 766–770. 1 D. & R. 433, 435. 2 D. & R. 565.

(*d*) 1 Inst. 202 a, n. 3.

(*e*) *Ante*, s. 20.

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† [A mortgagee of a lease has the same title to relief against an ejectment for non-payment of rent, and upon the same terms as the lessee, against whom the recovery is had. Doe d. Whitfield *v.* Roe, 3 Taunt. 401.]

[1] Where premises are demised by indenture, at an entire rent, no action lies on the covenant to pay the rent, unless the tenant has been let into full possession of the prem-

77. As it is a maxim of equity that a right shall not be without a remedy, the *Court of Chancery* will, in some cases, give its assistance to persons entitled to rent: but equity will not afford a remedy for rent, when there is one at law; nor change the nature of the rent, so as to make the person liable, unless there is fraud in preventing a distress. (*a*)

(*a*) Treat. of Eq. B. 1, c. 3, s. 3.

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ises demised. Holgate *v.* Kay, 1 Car. & Kir. 341. [Where the demised premises are destroyed after the execution of the lease, and before the commencement of the term, and before the lessee has taken possession, the lessee is not liable for rent on the lease. Wood *v.* Hubbell, 5 Barb. Sup. Ct. 601.]

By the common law, *assumpsit for the use and occupation of land* might be maintained, where the occupancy was not tortious, and there was an express parol promise to pay. Acton *v.* Symon, Cro. Car. 414; Eppes *v.* Cole, 4 Har. & McH. 161. In Connecticut, an implied promise has always been held sufficient. Gunn *v.* Scovil, 4 Day, 228. So, in Vermont. Howard *v.* Ramson, 2 Aik. 252.

But in England, in consequence of great doubts among the Judges whether this action would lie upon such a contract, it savoring of the realty, and therefore *debt* being the proper remedy; the statute of 11 Geo. 2, c. 19, § 14, was passed, giving this remedy in all cases of rent due upon a demise not by deed. The action is founded on privity of contract, and not on privity of estate; and the contract may be inferred from an actual holding by permission of the owner, either express or implied. Lloyd *v.* Hough, 1 How. S. C. R. 153; Henwood *v.* Cheeseman, 3 S. & R. 500; Osgood *v.* Dewey, 13 Johns. 240; Boyd *v.* Sloan, 2 Bail. 311; Sutton *v.* Mandeville, 1 Munf. 407; Logan *v.* Lewis, 7 J. J. Marsh. 6; Johnson *v.* Beauchamp, 9 Dana, 124. As, if the tenant hold over, after the expiration of a demise by deed. Davis *v.* Morgan, 4 B. & C. 8; Abeel *v.* Radcliff, 13 Johns. 297. Or, at least, such strong circumstances must be shown as would preclude the idea of an adverse claim. Pott *v.* Lesher, 1 Yeates, 576. It will not lie where the possession was tortious; or adverse in its character; or without an implied admission of the plaintiff's title. Ryan *v.* Marsh, 2 Nott & McC. 156; Henwood *v.* Cheeseman, *supra;* Stockett *v.* Watkins, 2 G. & J. 326; Cripps *v.* Blank, 9 Dowl. & Ryl. 480; Wyman *v.* Hook, 2 Greenl. 337; Allen *v.* Thayer, 17 Mass. 299; Wiggin *v.* Wiggin, 6 N. Hamp. 298; Codman *v.* Jenkins, 14 Mass. 95; Boston *v.* Binney, 11 Pick. 1; Fletcher *v.* McFarlane, 12 Mass. 46. And see Comyn, Landl. & Ten. p. 435–445; Birch *v.* Wright, 1 T. R. 387, per Buller, J.

If one enter on land as purchaser, under a contract for title, which the vendor fails to perform, the relation of landlord and tenant does not arise, and no action lies for the use and occupation of the land, though the occupation may have been beneficial. Winterbottom *v.* Ingham, 7 Ad. & El. 611, N. S.; Hough *v.* Birge, 11 Verm. 190; Little *v.* Pearson, 7 Pick. 301; [Barnes *v.* Shinholster, 14 Geo. 131.]

If the contract fails by accident, as, by the destruction of the premises by fire, before the conveyance, or goes off by consent, the tenant is liable in *assumpsit* for the use and occupation so far as it has been beneficial; Gould *v.* Thompson, 4 Met. 224; or, at least, for the time he occupied after the termination of the contract. Howard *v.* Shaw, 8 M. & W. 118.

If the contract fails of performance by the fault of the vendee, he is liable for an occupation rent; either in trespass, where he refuses to complete the purchase; Smith *v.* Stewart, 6 Johns. 46; Vandenheuvel *v.* Storrs, 3 Conn. 203; or in trespass or *assumpsit,* at

78. Where by great length of time it is become impossible to know out of what particular lands ancient quit rents are issuable, the Court of Chancery has exercised a jurisdiction; and has constantly, on proof of payment within a reasonable time, decreed a satisfaction for all arrears of such rents; and payment thereof for the future. (*a*)

(*a*) Bridgewater *v.* Edwards, 6 Bro. Parl. Ca. 368.

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the vendor's election. Clough *v.* Hosford, 6 N. Hamp. 234; Alton *v.* Pickering, 9 N. Hamp. 494, 498.

Where A, one of two owners, demised the whole in his own name, by writing not under seal, undertaking, for himself and his assigns, that the tenant should quietly enjoy the premises; and before the first payment of rent fell due, the lessor assigned his interest in the premises to B, the other owner, to whom the tenant afterwards paid that rent; it was held that the occupation of the tenant became in law an occupation by the permission of B, as soon as his interest accrued, and that he might have an action for use and occupation for the subsequent rent, by virtue of the statute of 11 Geo. 2, c. 19. Standen *v.* Christmas, 11 Jur. 694. [Under a joint lease to two tenants, the occupation of one is sufficient to make both liable for the rent. Kendall *v.* Carland, 5 Cush. 74; Harger *v.* Edmonds, 4 Barb. Sup. Ct. 256.]

The action of *assumpsit* for use and occupation is given by express statute, in the States of *New York, New Jersey, Delaware, Indiana, Illinois, Missouri, Florida,* and *Arkansas.* Rev. St. N. York, Vol. II. p. 32, s. 26, 3d ed.; Elmer Dig. 303, s. 3; Del. Rev. St. 1829, p. 365, s. 33; Ind. Rev. St. 1843, p. 443, s. 157; Ill. Rev. St. 1839, p. 485, s. 1; Missouri, Rev. St. 1845, p. 688, s. 12; Florida, Rev. St. 1847; Thomps. Dig. p. 397, s. 3; Ark. Rev. St. 1837, p. 520, s. 13.

CHAP. II.

OF THE ESTATE WHICH MAY BE HAD IN RENT, AND ITS INCIDENTS.

SECT. 1. *An Estate in Fee.*
2. *An Estate Tail.*
3. *An Estate for Life or Years.*
4. *Occupancy of a Rent.*
10. *Subject to Curtesy.*
13. *And to Dower.*
21. *Rents may be granted in Remainder.*
SECT. 24. *And to commence* in futuro.
26. *And to cease for a Time.*
27. *Are within the Statute of Uses.*
31. *Cannot be devested.*
34. *How forfeited or lost.*

SECTION 1. With respect to the estate which may be had in a rent, a person may be *tenant in fee simple*, of a *rent service* created prior to the statute *Quia Emptores*. And a *rent charge* may be limited to a person and his heirs, which will give him an estate in fee simple in it.

2. A rent charge being an incorporeal hereditament, issuing out of lands, is comprehended within the statute *De Donis Conditionalibus*, and may therefore be entailed. There is, however, a very material distinction between a rent limited to a person and the heirs of his body, and an estate in land limited in the same manner; of which an account will be given hereafter. (*a*)

3. A *rent charge* may be *limited* to a person for his own life, or for that of any other, or for any number of lives; in which case the grantee will be *tenant for life*, or *pour autre vie*, of such rent. A rent charge may also be limited to a person for any number of *years*.

4. By the common law there could be *no general occupant* of a rent; thus where a rent was granted to A during the life of B, and A died, living B, it was resolved, that the rent was determined. For the grant being originally made to A only, when he died, no one could claim it as occupant, because there could

(*a*) Tit. 2, c. 1. Tit. 86, c. 7.

be no entry upon it; nor could any one claim it under the
290 * deed *because no one was party to it, but the grantee.
It followed, therefore, that as no one could take it under the grant, it ceased. (*a*)

5. There might, however, be a *special occupant* of a rent, as if a rent was granted to A and his *heirs*, during the life of B, and A died, living B, the *heir* of A would take the rent as special occupant. (*b*)

6. A person granted a rent charge to W. R., to him and his heirs, during his life, and the lives of M. his wife, and D. and M. his daughters. It was contended that this rent, being granted to one and his heirs, during his life and that of three other persons, was not descendible to the heir, nor should the heir be occupant thereof. But all the Court held these limitations to be good enough; and that the heir should have this rent, as a party specially nominated, and as heir by descent; though it was not properly an estate descendible. (*c*)

7. It is said to have been formerly held, that if a man granted a rent to A, his *executors*, *administrators*, and assigns, during the life of B, the *executor* of the grantee should not be a special occupant, because it was a freehold, which could not descend to an executor. (*d*)

Mr. Cox, in his valuable notes on Peere Williams, has observed, that there seems to have been no sound reason for this distinction; and it appears to be now settled, that a freehold estate may become vested in *executors*, as special occupants. (*e*)

8. In consequence of the statute of Frauds, 29 Ch. II. c. 3, s. 12, an estate *pour auter vie* in a rent is now devisable; if not devised, it is assets by the statute 14 Geo. II. c. 20, in the hands of the heir, if he takes it as special occupant. Where there is no special occupant, it will vest in the executors or administrators of those who died possessed of it, and shall be assets in their hands. (*f*)

9. It is also said by Mr. Cox to have been laid down by Lord Harcourt, that if, since the statute of Frauds, a rent be granted to A for the life of B, and A die, living B, A's executors or

(*a*) Salter *v.* Boteler, Vaugh. 199. 1 Salk. 189.
(*b*) 1 Inst. 388 a. Vaugh. 201.
(*c*) Bowles *v.* Poore, Cro. Jac. 282.
(*d*) Buller *v.* Cheverton, 2 Roll. Ab. 152.
(*e*) 3 P. Wms. 264. Tit. 3, c. 1, s. 52, 53.
(*f*) Tit. 3, c. 1, ss. 45, 46.

administrators shall have it during the life of B. For the statute was not only made to prevent the inconvenience of scrambling for estates, and getting the first possession, after the death of the grantee; but likewise for preserving and continuing the estate during the life of the *cestui que vie.* And though by his * dying without having made any such disposition, * 291 in nicety of law, the estate would have determined, yet by the statute, that interest which passed from the grantor ought to be preserved, and should go to the executors or administrators of the grantee, during the life of the *cestui que vie;* and the statute in this case did not enlarge, but only preserve, the estate of the grantee. (*a*)

10. A person may be *tenant by the curtesy*, of a rent service, where he is entitled to the reversion; as also of a rent charge; and a *seisin in law* will be sufficient for that purpose, because in many cases it may be impossible to acquire any other seisin. (*b*)[1]

11. A rent charge was granted to a woman and her heirs, payable at two feasts in the year, the first payment to be made at such of the said feasts as should happen after the death of J. S. The woman married, had issue, and died. The question was, whether the husband should be tenant by the curtesy of this rent. No judgment appears to have been given; but Glynn, Chief Justice, thought the husband was entitled to curtesy; for though the rent was to commence *in futuro*, yet it was granted over presently, which proved it to be *in esse;* so that the wife might be said *habere hæreditatem;* and the seisin was not material, it being the case of a rent. (*c*)

12. It is said by Lord Coke, that if a woman make a gift in tail, reserving a rent to her and her heirs, and the donor taketh husband, and hath issue, and the donee dieth without issue; the wife dieth, the husband shall not be tenant by the curtesy

(*a*) 3 P. Wms. 264, n. D. 7 Ves, 448. (*b*) Tit. 5, c. 1. 1 Inst. 29 a.
(*c*) Dethick *v.* Bradburne, 2 Sid. 110, 117.

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[1] In several of the United States it is provided by statutes that a husband having title to rents in right of his wife, accruing in her lifetime, may recover them after her decease in the same manner as if she were living. 2 Kentucky Rev. St. p. 1350, s. 3; *Delaware*, Rev. St. 1829, p. 365; *Virginia*, Tate's Dig. p. 781, s. 29; *Missouri*, Rev. St. 1845, p. 687, s. 3.

of the rent; for that the rent newly reserved was determined by the act of God, and no estate thereof remained. But if a man be seised in fee of a rent, and maketh a gift in tail general to a woman; she taketh husband, and hath issue; the issue dieth; the wife dieth without issue; he shall be tenant by the curtesy of the rent, because it remaineth. (*a*)

13. A *rent service* is *subject to dower;* so that if a man makes a lease for years, reserving rent, and afterwards marries, and dies, his wife will be dowable of a third part of the reversion, together with a third part of the rent. So, if a man makes a gift in tail, reserving rent to him and his heirs, and after marries and dies, his wife will be dowable of this rent, because it is a rent in fee, and may by possibility continue forever. (*b*)

14. A *rent charge* in fee or in tail is also *subject to dower.* If a rent charge be granted to a man and his heirs, who dies,
292* and * his widow brings a writ of dower against the heir, and he answers that he claims the same as an annuity, and not as a rent charge, yet the widow shall recover dower out of it; for the heir cannot determine his election by claim, but by suing a writ of annuity. (*c*)

15. Where a rent *de novo* is granted to a man and the heirs of his body, and the grantee dies without issue, his widow shall not be endowed of it; for the rent being determined by the death of the husband without issue, the widow cannot be endowed of that which is not in being. Though it is otherwise where a tenant in tail of lands marries, and dies without issue, whereby the estate tail is determined, for in that case it has been shown that the wife shall be endowed. (*d*)

16. It is however said by Lord Talbot, in the above case, that if a rent *in esse* be granted to A in tail, remainder to B in fee, and A marries and dies without issue, his wife shall be endowed; or if a rent *de novo* be granted to A in tail, remainder to B in fee, and A marries and dies without issue, his wife shall be endowed. For the estate tail in the rent shall be allowed to continue, as against the remainder-man.

17. [But the widow is *not* entitled to dower out of a *personal annuity* granted to the husband and his heirs, because it is only

(*a*) 1 Inst. 30 a. *Vide* tit. 5, c. 2.
(*b*) 1 Inst. 32 a.
(*c*) 1 Inst. 32 a. Id. 144 b.
(*d*) Chaplin *v.* Chaplin, 3 P. Wms. 229. Tit. 6, c. 3

a charge upon the person of the grantor, and does not issue out of lands and tenements. (*a*)

18. In the case of Holderness *v.* The Marquis of Carmarthen, a yearly sum of £2000, payable out of the Post-Office revenues until £100,000 should be paid, in order to be laid out in land, was held to be an annuity perpetual in its nature. (*b*)

19. In the Earl of Stafford *v.* Buckley, an annuity granted by King Charles II. out of Barbadoes dues, was held not to be a rent nor realty. (*c*)

20. A widow, however, previously to the recent statute 3 & 4 Will. IV. c. 105, would not be entitled to dower out of a rent charge, unless the husband had the legal estate in it; but now, by the second section of that act, widows, married since the 1st of January, 1834, are dowable out of equitable estates.] (*d*)

21. A rent charge *may be granted in remainder* after a limitation of it to a person for life; and if a rent charge were granted to A for the life of B, remainder over; though A should die in the lifetime of B, so that the particular estate determined *in interest, as to the perception of the profits; yet, inasmuch as the terre-tenant during the time held the land discharged, it was sufficient to support the remainder. (*e*) *293

22. Mr. Fearne doubted whether this holding of the land discharged would have supported a contingent remainder; but has said, that at this day there could be no room for a question of this nature; for since the statute 29 Cha. II. and 14 Geo. II. c. 20, the rent charge is holden to continue in the personal representatives of the grantee, dying in the lifetime of the *cestui que vie.* (*f*)

23. A grant of a rent charge to A and the heirs of his body, remainder to B and his heirs, has been held to be good. For though it was objected that there could be no remainder of that whereof there was no reversion; yet it was held by Lord Holt that there may be a remainder of a rent *de novo;* for the intent of the party gives it, first a being for the whole, and then the lesser estates are carved out of it. (*g*)

24. A rent charge *de novo may be granted so as to commence*

(*a*) 1 Inst. 32, 144 b.
(*b*) 1 Bro. C. C. 377.
(*c*) 2 Ves. 170. Aubin *v.* Daly, 4 Bar. & Ald. 59.
(*d*) Chaplin *v.* Chaplin, infra. s. 30.
(*e*) Salter *v.* Butler, Yelv. 9.
(*f*) Fearne, Cont. Rem. 452. Ante, s. 8.
(*g*) Weeks *v.* Peach, 2 Salk. 577.

in futuro; for this is not like the case of lands, where the livery must carry the freehold immediately; and where the abeyance, for want of distinguishing in whom the freehold is, may be of prejudice to the rights of others. But the grant of a rent *de novo* is not attended with the like inconvenience; for no man can have a precedent right to a thing which is created by the grant itself.

25. A rent *in esse*, or already created, cannot however [at common law] be granted, to commence *in futuro;* because to such a rent there may be a precedent title; therefore, the grant is not good. For such freeholds being thus split and severed, do hide the person in whom the right is; by which the party that has right will not be able to discern against whom to bring his *præcipe* for recovering it. (*a*)

26. A rent *de novo* may be limited so as to *cease for a time* only, and *afterwards to revive.* Thus where a rent *de novo* was granted to a man and his heirs, with a proviso that if the grantee died, his heir within age, then the rent should cease during the minority of the heir. The grantee died leaving his heir within age. The widow of the grantee brought a writ of dower against the terre-tenant; and it was held in parliament that she should have execution against the heir, when he came of age. (*b*)

294* *27. Rents † are expressly mentioned in the statute 27 Hen. VIII. c. 10; they may therefore be *conveyed to uses*, and will be executed by the statute; which not only transfers the rent, but also all remedies and rights given for the recovery thereof. But that statute does not transfer collateral rights. (*c*)

28. T. C. granted a rent charge of £200 a year to trustees, in trust for Mary Cook, to hold to them, their heirs, executors, administrators, and assigns, in trust for the said Mary for life; with a clause of distress, and a covenant to pay the rent charge to the trustees for the use of the wife. The Court was of opinion that this rent charge was executed by the statute of Uses, by the express words thereof, which executes such rents granted for

(*a*) Gilb. Rent, 60.
(*b*) Fitz. Ab. Dower, 143. Jenk. Cent. 1 Ca. 6.
(*c*) Tit. 11, c. 3.

† [Such only of which the owner is seised, that is, rents in fee, in tail, or for life.]

life, upon trust, and transfers all rights and remedies incident thereto, together with the possession, to the *cestui que use;* so that though the power of distraining was limited to the trustees by the deed, yet by the statute which transferred that power to Mary Cook, she might distrain also. But the covenant, being collateral, could not be transferred. (*a*)

29. The operation of the statute of Uses is the same in the case of rents as in that of lands; for it only transfers the legal estate in the rent to the first *cestui que use;* therefore a conveyance to A and his heirs, to the use and intent that B and his heirs may receive a rent out of the estate, gives B the legal estate in the rent; and if it is afterwards declared that B and his heirs are to stand seised of that rent to uses, the intended *cestuis que use* take only trust or equitable estates. (*b*)

30. Lady Hanby conveyed divers lands, to the use and intent that certain trustees, in the deed named, should receive and enjoy a rent charge of £30 a year to them and their heirs; and then the said rent was to be to the use of Porter Chaplin in tail male, remainder over. Porter Chaplin died, leaving issue Sir John Chaplin, who married the plaintiff, and died without issue. One of the questions was, whether Lady Chaplin was dowable of this rent. (*c*)

Lord Talbot was of opinion, that Sir John Chaplin having only a trust estate in this rent, his widow was not dowable of it.

31. The mode in which seisin of a rent may be acquired has been already stated. Where a person has been once seized or *possessed of a rent, he *cannot afterwards be* *295 *disseised or dispossessed of it;* for a rent being merely a contingent right, collateral to, though issuing out of lands, it cannot be devested. And although a person entitled to a rent be not in the actual receipt and enjoyment of it, yet by *non-user* only, he does not cease to have a vested estate or interest therein, so that he still continues to be in possession; therefore a rent, being a mere creature of the law, is always considered to be in the possession of him whom the law adjudges to have a right to such possession. (*d*)

(*a*) Cooke *v.* Herle, 2 Mod. 138.
(*b*) Tit 12, c. 1.
(*c*) Chaplin *v.* Chaplin, 3 P. Wms. 229.
(*d*) C. 1. 5 Rep. 124 a. Hawk. P. C. c. 64, s. 45.

32. Thus Lord Coke says, a man *cannot be disseised* of a rent service in gross, rent charge, or rent seck, by attornment or payment of the rent to a stranger, *but at his election;* the rule of law being, *nemo redditum alterius, invito domino, percipere aut possidere potest.* And Lord Ch. B. Gilbert observes, that if A is seised of a rent charge, and the tenant of the land pays it to another, this does not devest A of his right; because the wrongful payment of A's tenant cannot alter his right. It is therefore a payment in his own wrong, and the rent still remains in arrear to A. (*a*)

33. It should however be observed, that Littleton states several cases of disseisin of rent; but these are only disseisins at the election of the party; for when he wrote, an assise was, in most cases, the only remedy for the recovery of a rent, which only lay where the party was disseised. But disseisins of incorporeal hereditaments are only at the election and choice of the party injured, who, for the sake of more easily trying the right, is pleased to suppose himself disseised; for as there can be no actual dispossession, he cannot be compulsively disseised of any incorporeal hereditament. (*b*)

34. A particular estate in a rent, or in any other incorporeal hereditament, is *not forfeited by a grant of it in fee simple*, by deed. As if tenant for life or years of a rent, grants the same by deed to another in fee, this is no forfeiture of his estate; for nothing passes thereby but that which lawfully may pass. (*c*)

35. A particular estate in a rent, or in any other incorporeal hereditament, *may, however, be forfeited by matter of record*, of which an account will be given in a subsequent title. (*d*)

36. Although it is said that rents cannot be devested, 296 * yet * avowries for rent are limited to fifty years, so that a quit rent or rent of assise may be lost by non-claim. But it was held, in a modern case, that mere length of time, short of the period fixed by the statute of Limitations, and unaccompanied with any circumstances, was not of itself a sufficient ground to presume a release or extinguishment of a quit rent. (*e*)

(*a*) 1 Inst. 323 b. Gilb. Ten. 104. Lit. s. 558, 9.
(*b*) Lit. s. 237, 240. 10 Rep. 97 a.
(*c*) 1 Inst. 251.
(*d*) Tit. 35, c. 12.
(*e*) Ante, s. 31. Stat. 32 Hen. 8. Eldridge *v.* Knott, Cowp. R. 214.

CHAP. III.

OF THE DISCHARGE AND APPORTIONMENT OF RENTS.

SECT. 1. *Discharge of Rent Service.*
16. *Discharge of Rent Charge.*
22. *Apportionment of Rent Charge.*
SECT. 27. *Apportionment of Rent Service at Law.*
44. *Apportionment by Statute* 11 *Geo.* II.

SECTION 1. A RENT SERVICE, being something given by way of retribution to the lessor, for the use and occupation of the land demised, the lessor's title to the rent is founded on the principle, that the land demised is enjoyed by the tenant; but if the tenant be by any means deprived of the land demised, his obligation to pay the rent ceases; as it would be unjust that he should be obliged to make a return for that which he does not enjoy. It follows that *if the tenant be evicted* from the lands demised to him, he will thereby be *discharged from payment of the rent.* (*a*)[1]

(*a*) Gilb. Rents, 145. (Wood *v.* Patridge, 11 Mass. 488, 493. Bordman *v.* Osborn, 23 Pick. 295.) 2 Roll. Ab. 489.

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[1] If the landlord wrongfully enter upon part of the premises, it is an eviction of the tenant; and he is discharged from payment of the rent, until he be restored to the possession of the entire premises. Lewis *v.* Payn, 4 Wend. 423. Thus, where one leased part of his farm to one, and afterwards granted the whole, including the reversion of the demised premises, to another in fee, reserving rent; and then entered and distrained the goods of the first lessee for rent accruing subsequent to the grant of the reversion, to which he was not entitled; it was held an eviction of the second grantee. Ibid. And see Salmon *v.* Smith, 1 Saund. 202, 204, note (2) by Williams, and cases there cited. Smith *v.* Raleigh, 3 Camp. 513; Briggs *v.* Hale, 4 Leigh. 484; Watts *v.* Coffin, 11 Johns. 499; Vaughan *v.* Blanchard, 4 Dal. 124; 1 Yeates, 175; Ascough's case, 9 Rep. 135; [Christopher *v.* Austin, 1 Kernan, (N. Y.) 216; Curtis *v.* Miller, 17 Barb. Sup. Ct. 477. Where an annual rent is reserved in a lease, and the lessee is evicted before the day of payment, by force of a title paramount to that of the lessor, no action lies against the lessee on the covenant for rent accruing before conviction. Russell *v.* Fabyan, 8 Foster, (N. H.) 543; Giles *v.* Comstock, 4 Comst. 270. But where rent is payable quarterly in advance, an eviction for non-payment during the quarter is no bar to an action for the rent, but the tenant is to pay rent for so much of the quarter as had elapsed at the time of eviction. Whitney *v.* Meyers, 1 Duer, (N. Y.) 266.] But a

2. In cases of this kind the tenant is, however, *liable to the payment of the rent* which became *due before the eviction*, be-

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mere entry of the landlord, amounting only to a trespass, will not be sufficient to prove an eviction. Hunt *v.* Cope, Cowp. 242; 1 Saund. 204, note (2); Bennett *v.* Bittle, 4 Rawle, 339. Whether an intolerable nuisance, erected by the landlord, and obliging the lessee to quit the premises, would amount in law to an eviction, *quære.* It was held by the Supreme Court of New York, in Pendleton *v.* Dyett, 4 Cowen, 581, that it would not. But this judgment was reversed on error, for reasons which, to practical men, at least, would seem perfectly satisfactory.

They were stated by Spencer, Senator, in the following terms:—"The opinion of the Supreme Court proceeds upon the ground that there must be an actual, physical eviction, to bar the plaintiffs; and in most of the cases cited, such eviction was proved; and all of them show that such is the form of the plea. But the forms of pleading given, and the cases cited, do not establish *the principle* on which the recovery of rent is refused, but merely furnish illustrations of that principle, and exemplifications of its application. The principle itself is deeper and more extensive than the cases. It is thus stated by Baron *Gilbert*, in his Essay on Rents, p. 145: 'A rent is something given by way of retribution to the lessor, for the land demised by him to the tenant, and consequently the lessor's title to the rent is founded upon this: that the land demised, is enjoyed by the tenant during the term included in the contract; for the tenant can make no return for a thing he has not. If therefore the tenant be deprived of the thing letten, the obligation to pay the rent ceases, because such obligation has its force only from the *consideration*, which was the enjoyment of the thing demised.' And from this principle, the inference is drawn, that the lessor is not entitled to recover rent in the following cases: 1st. If the lands demised be recovered by a third person, by a superior title, the tenant is discharged from the payment of rent after eviction by such recovery. 2d. If a part only of the lands be recovered by a third person, such eviction is a discharge only of so much of the rent as is in proportion to the value of the land evicted. 3d. If the lessor expel the tenant from the premises, the rent ceases. 4th. If the lessor expel the tenant from a part only of the premises, the tenant is discharged from the payment of the whole rent; and the reason for the rule why there shall be no apportionment of the rent in this case as well as in that of an eviction by a stranger, is, that it is the wrongful act of the lessor himself, 'that no man may be encouraged to injure or disturb his tenant in his possession, whom, by the policy of the feudal law, he ought to protect and defend.'

"This distinction, which is as perfectly well settled as any to be found in our books, establishes the great principle that a tenant shall not be required to pay rent, even for the part of the premises which he retains, if he has been evicted from the other part by the landlord. As to the part retained, this is deemed such a disturbance, such an injury to its beneficial enjoyment, such a diminution of the consideration upon which the contract is founded, that the law refuses its aid to coerce the payment of any rent. Here, then, is a case, where actual entry and physical eviction are not necessary to exonerate the tenant from the payment of rent; and if the principle be correct as applied to a part of the premises, why should not the same principle equally apply to the whole property demised, where there has been an obstruction to its beneficial enjoyment, and a diminution of the consideration of the contract, by the acts of the landlord, although those acts do not amount to a physical eviction? If physical eviction be not necessary in the one case, to discharge the rent of the part retained, why should it be essential in the other, to discharge the rent of the whole? If I have not deceived myself, the distinc-

cause the obligation continues as long as the consideration. But if the tenant be evicted by a title paramount, before the day ap-

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tion referred to settles and recognizes the principle for which the plaintiff in error contends, that there may be a constructive eviction produced by the acts of the landlord.

"An eviction cannot be more than an *ouster;* and we have the authority of Lord *Mansfield* for saying, that there may be a constructive ouster. In *Cowper*, 217, he remarks, 'Some ambiguity seems to have arisen from the term *actual ouster*, as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary; but that is not so; a man may come in by rightful possession, and yet hold over adversely without a title,' &c.

"I think the same principle governed an ancient case, stated in 1 *Rolle's Abridgment*, 454, of which the following is a translation: 'If the lessee for years of a house covenant to repair it and leave it in as good plight as he found it, and afterwards certain sparks of fire come from a chimney in the house of the lessor, not very distant, by which the house of the lessee is burned, that shall excuse the performance of the covenant; and the lessee is not bound to rebuild, because it came of the act of the lessor himself.' The analogy between the covenant to repair and that to pay rent is sufficiently strong to justify the application of this case to the latter; and if so, it establishes the doctrine that other acts of the landlord going to diminish the enjoyment of the premises, besides an actual expulsion, will exonerate from the payment of rent.

"That is precisely the principle contended for by the plaintiff in error in this case. It is a just and equitable doctrine, and has been so applied in analogous cases. In *Hearn* v. *Tomlin*, (*Peake's N. P. Cases*, 192,) which was an action for use and occupation of a wharf, (depending on the same principles as an action on a lease for rent,) the defendant had agreed to purchase the wharf under a representation of the plaintiff that he had a lease of it for 13 years, and entered into possession; but on discovering that the plaintiff had a lease for only three years, he refused to complete the purchase. Lord *Kenyon* held, that to maintain the action, it must appear that the occupation had been beneficial to the defendant, and that it appearing to have been injurious, the plaintiff could not recover.

"We regard cases as containing the evidence of the law, as evincing the rule of decision; and they are consulted to ascertain the principle on which that rule is founded. The review of the cases now made, shows that the principle on which a tenant is required to pay rent, is the beneficial enjoyment of the premises, unmolested in any way by the landlord. It is a universal principle in all cases of contract, that a party who deprives another of the consideration on which his obligation was founded, can never recover damages for its non-fulfilment. The total failure of the consideration, especially when produced by the act of the plaintiff, is a valid defence to an action, except in certain cases, where a seal is technically held to conclude the party. This is the great and fundamental principle which led the courts to deny the lessor's right to recover rent where he had deprived the tenant of the consideration of his covenant, by turning him out of the possession of the demised premises. It must be wholly immaterial by what acts that failure of consideration has been produced; the only inquiry being, has it failed by the conduct of the lessor? This is a question of fact, and to establish it, the proof offered in this case was certainly competent." See Dyett *v.* Pendleton, in error, 8 Cowen, 727, 730–733. [See also Gilhooley *v.* Washington, 4 Comst. 217. An intentional disturbance by the landlord of the tenant's beneficial use and enjoyment of the demised tenement, seriously injuring the tenant's business and destroying his comfort and that of his family, was held to constitute an evic-

pointed for the payment of the rent, such eviction will discharge the tenant from the payment of any part of it. (*a*) [1]

(*a*) 2 Roll. Ab. 489. Gilb. Rents, 145.

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tion by the landlord, which excused the tenant from payment of the rent. Cohen *v.* Dupont, 1 Sandf. Sup. Ct. 260.]

But whether such conduct of the landlord be technically an eviction, or not, it is well settled that the tenant is justified in quitting the premises, and that the landlord cannot recover any rent, where the premises prove to be so infected with a nuisance as to be unfit for occupation. Smith *v.* Marrable, 1 Car. & Marsh. 479. So, if the premises become unsafe or useless for want of repairs, and the tenant from year to year is not under any agreement to make them, he may quit, without notice; and will not be liable in *assumpsit* for use and occupation, to pay any rent after the occupancy ceased to be beneficial to him. Edwards *v.* Hetherington, 7 Dowl. & Ry. 117; R. & M. 268. And see Salisbury *v.* Marshall, 4 C. & P. 65; Cowie *v.* Goodwin, 9 C. & P. 378. But the tenant cannot make repairs at the expense of the landlord, unless there be a special agreement of the latter to pay for them. Mumford *v.* Brown, 6 Cowen, 475. In *Louisiana*, it is otherwise. Civil Code of Louisiana, Art. 2663, 2664.

If after the execution of the covenant, for payment of rent, &c., and before the time when the tenancy was to have commenced, the premises are rendered unfit for use, by the wrongful act of the landlord; the tenant will be justified in refusing to take possession, and will not be liable to pay the rent. Cleves *v.* Willoughby, 7 Hill, N. Y. Rep. 83. So, if the tenant has not been let into full possession of the premises, he is not liable on the covenant to pay an entire rent. Holgate *v.* Kay, 1 C. & K. 341. [Wood *v.* Hubbell, 5 Barb. Sup. Ct. 601.] But where the premises become useless by accident, as by the spreading of a poisonous weed over a pasture, causing the death of the cattle, the tenant is still liable. Sutton *v.* Temple, 12 M. & W. 52.

Though, where the premises are let at an entire rent, an eviction from part, if the tenant give up the residue, is a complete defence to an action for use and occupation; Smith *v.* Raleigh, *supra;* yet if the tenant continue in possession of the residue, he is liable upon a *quantum meruit.* Stokes *v.* Cooper, 3 Campb. 514, n. And see Willard *v.* Tillman, 19 Wend. 358; Prentice *v.* Elliott, 5 M. & W. 606; Fitchburg Man. Co. *v.* Melven, 15 Mass. 268, 270; Comyn, Landl. & Ten. 451, 452.

[1] Where a mortgagor in possession leased the premises, upon an express covenant for payment of the rent in advance; and afterwards the mortgagee entered for condition broken, and compelled the lessee, by threat of expulsion, to pay the rent to him; this was held an eviction of the lessee by title paramount, and a bar to an action of covenant by the mortgagor for the rent. Smith *v.* Shepard, 15 Pick. 147. And see Sapsford *v.* Fletcher, 4 T. R. 511, S. P. Johnson *v.* Jones, 9 Ad. & El. 909. Salmon *v.* Mathews, 8 M. & W. 827. [The law will imply in a lease, covenants against paramount title, and against such acts of the landlord as destroy the beneficial enjoyment of the premises. Wade *v.* Halligan, 16 Ill. 507; and if the landlord permits a nuisance, which makes the premises valueless for rent, it is an eviction, and may be set up in defence of an action for the rent. See, also, Dexter *v.* Manley, 4 Cush. 14. In a general lease of a store, or warehouse, there is no implied warranty that the building is safe, well built, or fit for any particular use. Dutton *v.* Gerrish, 9 Cush. 89.

A clause in a lease, that "the owner shall not be liable for any repairs on the premises during the term, the house being now in perfect order," has respect only to the condition of the house as an edifice in perfect repair, and not to the present or future purity of the air within it. Foster *v.* Peyser, Ib. 242. In a sealed lease of a house for

3. Where the lord purchases the tenancy, the rent will be discharged; for in such case the lord cannot have both the land and the rent. Nor shall the tenant be under any obligation to pay rent, when the land, which was the consideration, is resumed by the lord. This resumption or purchase of the tenancy by the lord, makes what is called an extinguishment of the rent. (*a*)

4. If the conveyance of the land to the lord be not absolute, but upon condition; or if it be only of a particular estate, of shorter duration than the estate which the lord has in the *rent service; in these cases, though there be an union of * 298
the tenancy and the rent in the same hand, yet that as union is only temporary, (for upon the performance of the condition, or determination of the particular estate, the tenant will be restored to the enjoyment of the land,) the obligation of the tenant to pay the rent will revive; therefore, the rent, in such case, is only suspended, not extinguished. (*b*)

5. Where a person, who has a rent service, *purchases part of the land* out of which the rent issues, the *whole of the rent service* is *not thereby discharged*, but *only a part proportioned to the quantity of land purchased;*[1] because, in the case of a rent service, the tenant, being under the obligation of fealty to perform to his lord the services due for the land which he holds of him, this obligation continues while any part of the land is held by the tenant; otherwise the remaining part of the lands would be held of nobody, and freed from all feudal services, which would formerly have been a detriment to the public. And as the tenure between the lord and tenant continued, for so much of the land as remained unpurchased, the tenant was, by his oath of fealty, obliged to perform the services; but as the

(*a*) Idem. Smith *v.* Malings, Cro. Jac. 160. Fishe *v.* Campion, 1 Roll. Abr. 234, (B.) 5. Ibid. 235, (B.) 12. Hodgkins *v.* Robson, 1 Vent. 277. S. C. 2 Lev. 148. (Vaughan *v.* Blanchard, 1 Yeates, 176. (*b*) Gilbert, Rents, 150.

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a private residence, there is no implied covenant that it is reasonably fit for a habitation. Ibid.]

[1] If the tenant, at a sheriff's sale on execution against the landlord, becomes the purchaser of the reversion of part of the premises, he may demand an apportionment of the rent. Nellis *v.* Lathrop, 22 Wend. 121. But if the landlord puts an end to the term between the days when the rent falls due, he cannot claim an apportionment of the rent since the last rent day, unless it has been so agreed by the parties. Zule *v.* Zule, 24 Wend. 76.

lord had resumed part of the land, the services were diminished in proportion to the quantity of land resumed. (*a*)

6. A person who has a *rent service* may *release a part of it;* which will not determine the whole rent, but only the part released. (*b*)

7. Where *the law creates a duty* or a charge, which the party is disabled to perform without any default in him, and he has no remedy over, there the law will excuse. This is the principle upon which the tenant has been held in the preceding cases, to be discharged from the payment of rent. But when the party, by *his own contract*, creates a charge or duty on himself, he is bound to make it good, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract.

8. In consequence of this principle, it was resolved that a *lessee for years was bound to pay* his rent, though an army had entered on the lands, and kept him out; because the rent became due by an *express agreement* between the lessor and lessee, not by act in law. For an *action of covenant* lay against the lessee for non-payment of the rent upon the reserva-
299* tion, *which was an agreement between them; and there was no more reason that the lessor should sustain the damage by the enemies than the lessee; inasmuch as the lessee had full power of the land during the term, and, by his own contract, was to pay the rent, upon all perils. (*c*)

9. It has been resolved that, if the lessee of a house *covenant* to pay rent during the term, he is compellable to pay it, though the *house is burnt down*, and the landlord is bound to rebuild it.[1]

(*a*) Idem, 152. Lit. Sec. 222. (*b*) 18 Vin. Ab. 504.
(*c*) Paradine *v.* Jane, 1 Roll. Ab. 939. Aleyn, 26. Sty. 47. (Pollard *v.* Shaaffer, 1 Dal. 210. Wagner *v.* White, 4 Har. & J. 565.)

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[1] This point has been frequently resolved. See Camden *v.* Norton, 1 Selw. N. P. 464; Izon *v.* Gorton, 7 Scott, 537; 5 Bing. N. C. 501; 3 Jur. 653; Chesterfield *v.* Bolton, 2 Com. R. 627; Bullock *v.* Dommitt, 6 T. R. 650; Fowler *v.* Bott, 6 Mass. 63; Phillips *v.* Stevens, 16 Mass. 238; Lamott *v.* Sterrett, 1 Har. & J. 42; Hallett *v.* Wylie, 3 Johns. 44; Wagner *v.* White, 4 Har. & J. 564; Gates *v.* Green, 4 Paige, 355; Linn *v.* Ross, 10 Ohio R. 412; Willard *v.* Tillman, 19 Wend. 358; Smith *v.* Ankrim, 13 S. & R. 39; Magaw *v.* Lambert, 3 Barr, 444; White *v.* Molyneux, 2 Kelly, 124; Ward *v.* Bull, 1 Branch, 271. And see Walton *v.* Waterhouse, 2 Saund. 422, *a*, note (2;) Packer *v.* Gibbins, 1 Gale & D. 10; 5 Jur. 1036; 1 Ad. & El. 421, N. S. [See also Jaques *v.* Gould, 4 Cush. 384; Bigelow *v.* Collamore, 5 Cush. 226; Davis *v.* Alden, 2

And this doctrine has been fully confirmed in the following modern case. (*a*)

10. In a lease of a house and warehouse at Wapping, the lessee covenanted to pay the rent, and keep the premises in repair, casualties by fire only excepted. The house was burnt down by accident, and the lessor brought an action of covenant for the rent. The lessee pleaded that the house was burnt down by accident. Upon demurrer, the Court was of opinion that the point had been determined in the cases of Paradine *v.* Jane, and Monk *v.* Cooper; and judgment was given for the plaintiff. (*b*)

Mr. Justice Buller read a note of the case of Pindar *v.* Rutter, at the sittings at Westminster, after Mich. 1767, which was an ejectment by the tenant against his landlord, to recover the possession of some houses that had been burnt down during the

(*a*) Monk *v.* Cooper, 2 Ld. Raym. 1477. (*b*) Belfour *v.* Weston, 1 Term R. 310, 710.

Gray, 309; Lockwood *v.* Lockwood, 22 Conn. 425; Davis *v.* Smith, 15 Mis. 467; Neidelt *v.* Wales, 16 Mis. (1 Bennett,) 214; Moffatt *v.* Smith, 4 Comst. 26; Cram *v.* Dresser, 2 Sandf. Sup. Ct. 120.]

But in Ripley *v.* Wightman, 4 McCord, 447, it was decided that, where one leased a house for a year, and during the term it was rendered uninhabitable by a storm, the rent ought to be apportioned. Nott, J., *dissentiente.*

If the lease is by parol, for a rent payable quarterly, with an agreement that the rent shall cease upon destruction of the premises by fire, and the house is burned in the middle of the quarter, the tenant is liable, in an action for use and occupation, for the time he occupied. Parker *v.* Gibbins, *supra.* Voluntine *v.* Godfrey, 9 Verm. 186.

If it be provided that the rent shall cease upon the premises becoming untenantable from fire or other casualty, and part of the building be taken down by public authority, in order to widen the street, this is not a casualty, within the provision. Mills *v.* Baehr, 24 Wend. 254.

So, where the tenant covenanted to pay rent, and to leave the premises in good repair, and the front of the land and of the building was taken by public authority, to widen the street, it was held that this did not put an end to the term, nor absolve the tenant from his covenants to repair and pay rent. But whether the erection of the new front wall was not rather an addition and improvement to the premises, than a reparation, within the meaning of the covenant, was not decided. Patterson *v.* Boston, 20 Pick. 159.

[A demise of the basement rooms of a building of several stories in height, without any stipulation, by lessor or lessee, for rebuilding in case of fire or other casualty, gives the lessee no interest in the land, though he pays all the rent in advance; and if the whole building is destroyed by fire, his interest in the rooms is terminated. Stockwell *v.* Hunter, 11 Met. 448. Whether the lessee may recover back a portion of the rent so paid, *quære.* Ibid.

Where the lease has no covenants for quiet enjoyment, and a building is removed from the leased premises by public authority, the lessee must pay rent for so much time as he has had undisturbed occupation. Noyes *v.* Anderson, 1 Duer, (N. Y.) 342.]

term, and had been rebuilt by the landlord. In the lease, there was an express covenant, on the part of the tenant, to pay rent; but he had paid none subsequent to the fire. Lord Mansfield said, the consequence of the house being burnt down was, that the landlord was not obliged to rebuild; but the tenant was obliged to pay the rent during the whole term. The premises consisted of houses only, and the fire had made them quite useless. In March, 1793, the premises were worth nothing; but the landlord, if he had insisted on the rigor of the law, might have obliged the plaintiff to pay rent for nothing, during the remainder of the term; and then the plaintiff would have been glad to have delivered up the premises. Therefore he left it to the jury to consider whether it was not to be presumed that the tenant had abandoned the lease at the time of the fire; and accordingly the defendant had a verdict. (*a*)

11. [Again, in Baker *v.* Holtzapffell, where the lessee held under an agreement for a lease, by which he agreed to
300* pay rent *during the demise of the term specified in the agreement, the premises were burnt down. Mansfield, C. J., held the tenant liable to pay the rent. (*b*)

12. But the supposed hardship of the case, that a man should pay rent for what he cannot enjoy, and that occasioned by an accident which he did not undertake to stand to, seems to have occasioned the strong opinion, expressed by Lord Northington in Brown *v.* Quilter, that although there might be no defence to an action at law, yet there was good ground for an injunction, until the house was built. In Camden *v.* Morton his Lordship adhered to the same opinion. (*c*) [1]

(*a*) 1 T. R. 312. (*b*) 4 Taunt. 45. Infra, s. 15. (*c*) Ambl. 619. 2 Eden, 219.

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[1] The opinion of Lord Northington is in accordance with the doctrine of the Roman Civil Law. Si vis tempestatis calamitosæ contigerit, an locator conductori aliquid præstare debeat, videamus? *Servius*, omnem vim, cui resisti non potest, dominum colono præstare debere, ait. Dig. lib. 19, tit. 2, l. 15, §§ 2, 3. This rule was applied in all cases, where the tenant had not expressly taken the risk of accidents upon himself. Cod. lib. 4, tit. 65, l. 8. Such is the law in France. Cod. Civ. Art. 1722, 1733. And in Louisiana. Civil Code, Art. 2662–2669. But the rule of the common law, as Chancellor Kent remarks, "only applies to *express* agreements to pay; and if a party will voluntarily create a duty or charge upon himself, he ought to abide by it when the other party is not in fault, and when he might have provided, if he had chosen, against his responsibility in case of such accidents. The loss of the rent must fall either on the

13. In the subsequent case of Steele *v.* Wright, Lord Apsley decided that though the landlord was not bound to rebuild, yet the tenant was neither obliged to rebuild, nor to pay the rent, until the premises were rebuilt. (*a*)

14. But the three preceding authorities appear to have been overruled in Hare *v.* Groves. There the *lessee covenanted to repair, "damage by fire only excepted."* The premises were burnt down, and the lessor refused to rebuild the premises, or take a surrender of the lease, and commenced an action at law on the covenant for non-payment of the rent accruing since the fire. A bill was filed for an injunction, and to compel the lessor either to accept a surrender or to rebuild. The Court of Exchequer, after full consideration, decided that as there was no defence against an action at law, so the tenant had *no remedy in Equity* against the effect of the substantial independent covenant to repair. (*b*)

15. In Holtzapffell *v.* Baker, Lord Eldon followed the last case. There the rent had been regularly paid to Michaelmas, 1809; on the 15th of January, 1810, the premises were burnt down and continued in a state of ruin, so that the tenant was deprived of the occupation and use of them. The defendant having brought his action for a year and a half's rent from Michaelmas, 1809, to Lady-day, 1811, the plaintiff filed his bill, praying that the defendant might rebuild the premises, and for an injunction against proceedings at law. The preceding authorities were discussed in the argument, and Lord Eldon decided that the tenant had

(*a*) 1 T. R. 708.. (*b*) 3 Anst. 687.

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lessor or lessee; and there is no more equity that the landlord should bear it than the tenant, when the tenant has engaged expressly to pay the rent, and when the landlord must bear the loss of the property destroyed. The calamity is mutual; and there is much weight in the observation of the counsel, in one of the cases referred to, that these losses by fire may often proceed from the carelessness of tenants; and if they can escape from the rent, which they may deem inconvenient, by leaving the property carelessly exposed, it might very much lessen the inducements to a reasonable and necessary vigilance on their part." 3 Kent, Comm. 467.

"In all cases of this sort," says Mr. Justice Story, "the rule prevails, *Res perit domino;* and therefore the tenant and landlord suffer according to their proportions of interest in the property burnt; the tenant, during the term, and the landlord for the residue." 1 Story, Eq. Jur. § 102. The whole subject is well discussed in the Law Magazine, (Lond.) Vol. II. p. 290–299.

no equity, and that the injunction which had been obtained for want of an answer should be dissolved.] (*a*)

16. With respect to the *discharge of a rent charge*, it is 301* laid *down by Littleton, s. 222, that if a man has a *rent charge* issuing out of certain lands, and *purchases any part* of them, the rent charge is extinct. Lord Coke says, the reason is, because the rent is entire, and against common right, and issuing out of every part of the land; therefore, by purchase of part, it is extinct in the whole. (*b*)

17. Lord C. B. Gilbert observes, that the reason of the difference between this case and that of the purchase of part of the lands out of which a rent service issues is, because, in the case of a *rent charge* there is *no connection of tenure* between the grantor and grantee, as *there is* in the case of a *rent service.* And as grants of rent charges were of no benefit to the public, and afforded no additional strength or protection to the kingdom, the law carried them into execution only so far as they could take effect according to their original intention; therefore where the grantee, by his own act, prevented the operation of the grant according to its original intention, the whole grant determined. (*c*)

18. If the grantee of a rent charge purchases parcel of the land, and the grantor, by his deed, reciting the said purchase of part, grants that he may distrain for the said rent in the residue of the land, this amounts to a *new grant.* (*d*)

19. If a person having a *rent charge* issuing out of *three acres* of land, *releases all his right in one acre*, the rent is *extinct;* because all issues out of every part, and it *cannot be apportioned.* But if a person has a rent charge of 20*s.*, he may release to the tenant of the land 10*s.*, and reserve part; for the grantee deals only with that which is his own, namely, the rent, and not with the land. (*e*)

20. It frequently happens in practice, that a person entitled to a rent charge is disposed to exonerate part of the lands from the payment of it: but, in consequence of the above doctrine, difficulties have arisen in settling the mode of effecting such

(*a*) 18 Ves. 115. (See also, Leeds *v.* Chatham, 1 Sim. 146. Lamott *v.* Sterrett, 1 Har. & J. 42. White *v.* Molyneux, 2 Kelly, 124.)

(*b*) 1 Inst. 147 b. (*c*) Gilb. Rents, 152. (*d*) 1 Inst. 147 b.

(*e*) 18 Vin. Ab. 504. 1 Inst. 148 a. 8 Vin. Ab. 10, 11.

exoneration, without risking the entire extinguishment of the rent charge. The common mode has been for the grantee of the rent charge to join in the conveyance of the lands, which operates as a release of the lands conveyed, from the payment of the rent charge; and to insert a proviso in the deed, that the other lands shall continue subject to the rent charge. And it is held, that this proviso operates as a new grant of the rent charge.

To this *mode, however, there is a material objection: *302 for such new grant would be subject to any incumbrances created subsequent to the grant of the original rent charge, but prior to the conveyance of part of the lands.

21. Another mode is sometimes adopted: that is, to obtain a covenant from the grantee of the rent charge, that he will not distrain or enter on the premises conveyed for the recovery of his rent charge. But there is a case, in which one of the Judges held that such a covenant would operate as a release of the whole rent charge, though Anderson was of a different opinion. (*a*)

22. There are *many cases* in which a rent charge or a rent service *may be apportioned*, as well by the act of the party, as by the act of the law. Thus, where the grantee of a *rent charge releases part of the rent to the tenant*, such release will not extinguish the whole rent: but the part not released will still continue. (*b*)

23. So if the grantee of a *rent charge conveys part of it to a stranger*, and the tenant of the land *attorns*, such grant will not extinguish the residue, because such release or disposition makes no alteration in the original grant; nor does it defeat the intention of it, as the purchase of part of the land does, for the whole rent is still issuable out of the whole land, and charged according to the original intention of the grant. Besides, since the law allowed of such grants, and thereby established this kind of property, it would have been unreasonable and severe to hinder the proprietors of rent charges from dividing them, for the promotion of their children. (*c*)

24. Lord Ch. B. Gilbert observes, that the objection which has been made to this kind of apportionment of rent charges is

(*a*) Butler *v.* Monnings, Noy, 5. Deux *v.* Jefferies, Cro. Eliz. 852. Ambl. 250.

(*b*) Gilb. Rents, 163. 18 Vin. Ab. 504. (Farley *v.* Craig, 6 Halst. 262. Rivis *v.* Watson, 5 M. & W. 255.)

(*c*) Idem.

this: that the tenant would be thereby exposed to several suits and distresses for a thing, which, in its original creation, was entire. But the answer is obvious, that it is in the tenant's choice whether he will submit himself to this inconvenience by his attornment to the grant of a part of the rent charge. Now the necessity of an attornment is taken away: but still a division or apportionment of a rent charge, by a conveyance of part of it to a stranger, is held good. (*a*)

25. A *rent charge* may be divided and *apportioned by act in law;* for a part of a rent may be extended by a *scire facias.* And though it was said that the tenant was thereby, without
303 * his * attornment, made liable to several suits and distresses, yet it was an inconvenience which he might avoid by punctual payment of his rent. (*b*)

26. If part of the lands subject to a *rent charge descend to the grantee*, it shall be apportioned according to the value of the land; for in this case the grantee is perfectly passive, and does not concur by any act of his to defeat the intention of the grant. (*c*)

27. With respect to the *apportionment of rent service* it has been stated in sect. 5 that where a person, having a rent service, *purchases part* of the land out of which it issues, the rent service is not extinguished, but *shall be apportioned* according to the value of the land; so that the purchase shall operate as a discharge to the tenant for so much of the rent as is equal to the value of the land purchased.

28. This *rule only applies* to such services as are *divisible in their nature*, such as rent; for with respect to *indivisible services*, as where the tenant is bound to render a horse, a hawk, or such like, though the lord purchases part of the tenancy, yet, as there can be *no apportionment* of these services, they shall become extinct, and the tenant will be discharged from them; for the whole tenancy being equally chargeable, the lord, by his own act, shall not discharge part, and throw the whole burthen upon the residue, for his own private benefit and advantage. (*d*)

29. Where such *entire service* is for the *benefit of the public*, as castle guard, cornage, &c., or to repair a bridge or way, or to

(*a*) Gilb. Rents, 164. Cro. Eliz. 742.
(*b*) Wotten *v.* Shirt, Cro. Eliz. 742. Gilb. Rents, 165.
(*c*) Lit. s. 224. Gilb. Rents, 156. (*d*) Lit. s. 228. Gilb. Rents, 165.

keep a beacon, or for the *advancement of justice;* or if it be a *work of piety;* in all such cases, the *tenant is still chargeable for the whole services;* for the thing is in its nature indivisible; and the whole shall not be extinguished, because the public has an interest in such services; and shall not be prejudiced by the private transactions of the parties. (*a*)

30. If there be lord and tenant by fealty and heriot service, and the lord purchases part of the land, the heriot service is extinct, because it is entire and valuable. It is otherwise in the case of heriot custom, as has been already shown. But where part of the tenancy comes to the lord by descent, the services are not extinct, though indivisible. (*b*)

31. It was formerly doubted whether a rent service incident to a reversion might be apportioned by a grant of part of the *reversion; or whether the whole rent should not be *304 extinct and lost. For, since the reversion and rent incident thereto were entire in their creation, it was thought hard that they should be divided by the act of the lessor, and the tenant thereby made liable to several actions and distresses. (*c*)

32. It has, however, been long settled, that where *part of the reversion is granted away*, the rent shall be apportioned; for the rent is incident to the reversion.[1] Therefore, if a person makes a lease of three acres of land, reserving three shillings rent; as he may dispose of the whole reversion; so may he also dispose of any part of it, since it is a thing in its nature severable; and the rent, as incident to the reversion, may be also divided, because that being a retribution for the land, ought to be paid to those who are to have the land upon the expiration of the lease.

(*a*) 1 Inst. 149 a. Gilb. Rents, 166.
(*b*) 1 Inst. 149 b. Talbot's case, 8 Rep. 104. Tit. 10, c. 4, s. 54. Gilb. Rents, 167.
(*c*) Idem, 172. (*Ante*, tit. 17, ss. 18, 19.)

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[1] In *Massachusetts*, every person in possession of land out of which any rent is due, whether it was originally demised in fee, or for any other estate of freehold, or for years, is liable for the amount or proportion of rent, due from the land in his possession, though it be only a part of what was originally demised. Mass. Rev. St, 1836, ch. 60, s. 22. And where part of the land is taken in execution against the lessor, the tenant is bound to pay to the judgment creditor the proportion of the rent, to be ascertained by appraisers. Ibid. ch. 73, s. 14. The former of these provisions is also contained in the laws of *Michigan*. Rev. St. p. 265, s. 19.

Hence it is that the rent, or a proportionable part thereof, passes immediately with the reversion, without any express mention being made of it in the grant. (*a*)[1]

33. A *rent service* may also be *apportioned by a devise of it to several persons.* As where A leased to B, rendering £10 rent; and then devised £6, part thereof to C, D, and E, severally, to each of them a third part; it was resolved, that an action of debt was maintainable by one of the devisees. For though the lessee by this means became subject to several distresses and actions, without attornment, yet these were mischiefs which he might prevent, by a punctual payment of his rent. (*b*)

34. [But rent reserved on a lease for years is not apportioned by the alienation of the lessee; for the lessee, although he aliene the whole or part of his estate, will nevertheless continue liable for the whole of the rent. The effect of assignment by the lessee is not to discharge himself, but will give the lessor a double remedy for his rent; one against the lessee for the whole, in respect of his privity of contract, and another against the assignee of his part, in respect of his privity of estate.] (*c*)

35. It has been stated that a rent service is discharged by the eviction of the tenant out of the whole land, from which the rent issues; but where only *part of the land is evicted*, the *rent will be apportioned.* (*d*)

36. Where a *right of common is established on land demised*, the rent *cannot be apportioned at law*, as there is no eviction.

And in a case of this kind, the Court of Chancery re-
305 fused to *apportion the rent, because the lands were worth more than what was reserved.

37. The plaintiff was lessee of divers lands, whereupon an

(*a*) Collins *v.* Harding, 13 Rep, 57. Gilb. Rents, 178. 1 Jac. & Walk. 184. 3 B. & Ald. 876. (Farley *v.* Craig, 6 Halst. 262. Daniels *v.* Richardson, 22 Pick. 565.)

(*b*) Ards *v.* Watkin, Cro. Eliz. 637, 651.

(*c*) Rushden's case, Dy. 4 b. Broom *v.* Hore, Cro. Eliz. 638. Stevenson *v.* Lambard, 2 East, 580.

(*d*) Ante, s. 2. 1 Inst. 148 b. 2 East, 580.

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[1] Where the reversion is granted, the grantee is entitled to the rent for the then current quarter; and parol evidence of a contemporaneous verbal agreement to apportion the rent is not admissible. Flinn *v.* Calow, 1 M. & G. 589. And see Burden *v.* Thayer, 3 Met. 76.

[Where a landlord demises a farm, and, before the termination of the lease, sells a part of it, he does not thereby forfeit the whole rent, nor the power to distrain. The rent must be apportioned. Reed *v.* Ward, 22 Penn. (10 Harris,) 144.]

entire rent was reserved; afterwards the inhabitants of the town where part of the land lay, claimed a right of common there, and upon a trial established it. This not being an eviction of the land at law, because the soil was not recovered, there could be no apportionment of the rent at law; therefore, a bill was brought to have the rent apportioned in equity. Sergeant Maynard insisted that such an apportionment had frequently been decreed in equity; but it appearing that the lands were worth the rent reserved, and more, the Court would not decree an apportionment. (*a*)

38. With respect to those cases where a rent service shall be *apportioned by the act of God*, it is said in Rolle's Abridgment, that if a man leases land for life or years, rendering rent, and after, part of the land is surrounded by water, this will not make any apportionment of the rent, because the soil remains, and may be regained again; but if part of the land be surrounded or *covered with the sea*, this will make an apportionment of the rent; for though the soil remains to the lessee, yet, by ordinary intendment, there is no probability of regaining it. (*b*)

39. If land demised be burnt by wild fire, yet the rent shall not be apportioned, for the land remains, notwithstanding, and cannot be so consumed but that some benefit may be made of it. (*c*)

40. A rent service may also be *apportioned by act of law;* as where *a moiety* of a reversion is *extended upon a writ of elegit*, the rent shall be apportioned, and the lessor shall have half of it, as incident to the reversion that remains in him. (*d*)

41. So where a husband leases for years, reserving rent, and dies, and his *widow recovers a third part of the reversion for her dower*, she shall have the same proportion of the rent; for in all these cases the law apportions the rent, in the same manner as it disposes of the reversion. (*e*)

42. [So where the *reversion descends or devolves upon different classes of representatives of the lessor;* as where one, seised in fee of Black Acre, and lessee for twenty years of White Acre, leases both by one demise for ten years, rendering an entire rent, and dies; whereupon the reversion of Black Acre descends

(*a*) Jew *v.* Thirkwell, 1 Cha. Ca. 31. (*b*) Roll. Abr. vol. i. 236. (*c*) Idem.
(*d*) Campbell's case, 1 Roll. Abr. 237. Tit. 14. (Nellis *v.* Lathrop, 22 Wend. 121.)
(*e*) Idem.

306 * upon * his heir, and that of White Acre to his executor; the rent shall be apportioned to the different reversions. (*a*) [1]

43. Again where one leases one acre of borough English, and another of gavelkind tenure, by one demise at an entire rent, and having issue two sons, dies; the rent shall be *apportioned according to the course of descent.*] (*b*)

44. At *common law*, if a *tenant for life died before the day on which the rent became due*, where the lease determined by the death of the tenant for life, his *executors could not claim an apportionment* of the rent; *nor could the remainder-man* or reversioner *claim that part of it* which *accrued during the life of the tenant for life;* so that the tenant paid nothing. (*c*) [2]

(*a*) Moody *v.* Garnon, 1 Roll. Abr. 237, (D) 5. S. C. 3 Bulstrode, 153.

(*b*) Rushden's case, Dy. 4 b. Ewer *v.* Moyle, Cro. Eliz. 771.

(*c*) Jenner *v.* Morgan, 1 P. Wms. 392. (Hay *v.* Palmer, 2 P. Wms. 501. Ex parte Smyth, 1 Swanst. 338.)

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[1] So, where the lessor dies, and the reversion descends to his several heirs, the rent shall be apportioned, and the heirs may have several actions for their shares of the rent. Cole *v.* Patterson, 25 Wend. 456. [See Porter *v.* Bleiler, 17 Barb. Sup. Ct. 149.]

[2] This rule of the common law is said to rest on these two propositions:—1. That an entire contract cannot be apportioned;—2. That under a lease, with a periodical reservation of rent, the contract for the payment of each portion is distinct and entire. The former of these propositions seems founded on this reasoning; that the subject of the contract being complex in its nature, and constituted by the performance of various acts, its imperfect completion, by the non-performance of some of the acts, cannot create a title to the whole or any part of the stipulated benefit. Hence it followed, that on the determination of a lease by the death of the lessor, before the day appointed for payment of the rent, the event, on the completion of which that payment was stipulated, not having occurred, namely, the occupation of the lands during the entire period specified, no rent became payable; and, in respect of time, apportionment was in no case permitted. But in the case of real contracts, the general principle received a partial qualification, on a division of the subject matter to which the contract referred; and hence, under certain circumstances, on a division of the land out of which a rent issued, or of the reversion to which it was incident, an apportionment of the rent was allowed, by the common law. But though such apportionment was allowed, upon a division of the subject or source from which the rent issued; yet while the subject remains entire, an apportionment of the rent, in respect to *time alone*, has never been permitted, either at Law or in Equity. See Ex parte Smyth, 1 Swanst. 338, note (*a.*) where this subject is ably treated by the learned reporter, and all the cases are cited. See also 3 Kent, Comm. 370, 371. In Perry *v.* Aldrich, 13 N. Hamp. Rep. 343, the same doctrine was affirmed, upon full consideration, and review of the authorities.

The applicability of the rule, that an entire contract cannot be apportioned, to the case of a contract for labor and service, was considered, and the principle examined

45. This defect in the law produced the statute 11 Geo. II. c. 19, s. 15, by which it is enacted, "That where any tenant for life shall die before or on the day on which any rent was reserved or made payable, upon any demise or lease of lands, tenements, or hereditaments, which determined on the death of such tenant for life; that the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under tenant or under tenants of such lands, &c. if such tenant for life die on the day on which the same was made payable, the whole; or if before such day, then a proportion of such rent, according to the time such tenant for life lived of the last year or quarter of a year, or other time in which the said rent was growing due as aforesaid; making all just allowances, or a proportionable part thereof accordingly."[1]

46. This statute only extends to rents reserved on leases which determine by the death of the lessor; for where the lease does not determine on that event, the person in remainder or reversion becomes entitled to the whole rent due from the day of payment preceding the death of the tenant for life.

47. [It does not seem to be settled whether the provisions of the above statute, 11 Geo. II. c. 19, extend to a lease (not pursuant to the enabling statute) made by tenant in tail. The cases which bear upon the point have arisen between the executors of the tenant in tail and the remainder-man, and not between the former and the lessee; and they all appear to have turned upon the fact of actual payment of the rent by the lessee to the remainder-man.]

*48. In Pagett *v.* Gee, which was decided in Chancery *307 in 1753, the tenant in tail, with remainder to the defendant in fee, leased for years; and died without issue, a week before

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with great research and learning, by Parker, C. J., in Britton *v.* Turner, 6 N. Hamp. Rep. 481. See 2 Greenl. Evid. s. 136 *a*.

[1] This statute has been reënacted in some of the United States; and in some others its rule has been adopted by usage and recognized by the Courts. See *New York*, Rev. St. Vol. II. p. 32, § 22, 3d ed.; 3 Kent, Comm. 471; Howard *v.* Ransom, 2 Aik. 252. *Pennsylvania*, Dunlop's Dig. p. 511, § 7; 3 Binn. 626; Bank of Pennsylvania *v.* Wise, 3 Whart. 394. *Maryland*, Dorsey *v.* Hays, 7 Har. & J. 370. *New Jersey*, Elmer's Dig. p. 302, § 2. *Missouri*, Rev. St. 1845, ch. 98, § 1, p. 687. *Delaware*, Rev. St. 1829, p. 365, § 32. And see Tate's Dig. *Virg.* p. 405, § 56. *Kentucky*, Rev. St. 1834, Vol. I. p. 668, § 48.

the day of payment of the half year's rent. The lessee, at the day, paid all the half year's rent to the defendant; against whom the executor of the tenant in tail brought his bill for an apportionment of the rent. Lord Chancellor Hardwicke observed, "This point has never been determined; but this is so strong a case, that I shall make it a precedent. There are two grounds for relief in equity. The first arises on the statute 11 Geo. II., the second arises on the tenant's having submitted to pay the rent to the defendant. The relief, arising upon the statute, is either from the strict legal construction, or equity formed upon the reason of it. And here it is proper to consider, what the mischief was before the act, and what remedy is provided at common law. If tenant for life, or any who had a determinate estate, died but a day before the rent reserved on a lease of his became due, the rent was lost; for no one was entitled to recover it. His representatives could not, because they could only bring an action for the use and occupation; and that would not lie where there was a lease, but debt or covenant; nor could the remainder-man, because it did not accrue in his time. Now, this act appoints the apportioning the rent, and gives the remedy. But there are two descriptions of persons, to whose executors the remedy is given; in the preamble it is one, having only an estate for life; in the enacting part, it is tenant for life. Now, tenant in tail comes expressly within the mischief. I do not know how the Judges at common law would construe it; but I should be inclined in this Court to extend it to them. I should make no doubt, where this is the case of tenant in tail after possibility of issue extinct; for he is considered, in many respects, as tenant for life only. He cannot suffer a recovery: he may be enjoined from committing waste, such as hurts the inheritance, as felling timber; though not for committing common waste, being considered as to that as tenant in tail. Where it is the case of tenant for years determinable on lives, he certainly must be included within the act; though it says only tenant for life: it would be playing with the words to say otherwise. These cases show the necessity of construing this act beyond the words. Tenant in tail has 308 * certainly * a larger estate than a mere tenant for life; for he has the inheritance in him, and may, when he pleases, turn it into a fee: but, if he does not, at the instant of his death,

he has but an interest for life. Such, too, is the case of a wife, tenant in tail *ex provisione mariti;* upon this point I give no absolute opinion. As to the equity arising from this statute, I know no better rule than this; *equitas sequitur legem;* where equity finds a rule of law agreeable to conscience, it pursues the sense of it to analogous cases. If it does so as to the maxims of the common law, why not as to the reasons of the act of parliament? Nay, it has actually done so on the statute of Forcible Entry, on which this Court grounds bills, not only to remove the force, but also to quiet the possession. This Court extends the reason to equitable interests: but I ground my opinion, in this case, on the tenant's having submitted to pay the rent. He has held himself bound in conscience, for the use and occupation of the land the last half year; he paid it to the defendant, which he was not bound to do in law. And, in such a case, the person he pays it to shall be accountable, and considered as receiving it for those who are in equity entitled thereto. The division must be that prescribed by the statute; and then the plaintiff is entitled to such a proportion of the rent, as accrued during the testator's life." Accordingly it was so decreed. (*a*)

49. [The next case is Whitfield *v.* Pinder, which was decided in the Common Pleas (1781,) and is shortly cited in Vernon *v.* Vernon. There the tenant in tail made a lease, void against the remainder-man, reserving rent, and died three weeks after the rent-day: it was decided that the rent should be apportioned. From this short statement, unexplained, it might be inferred that the case decided the point, that a tenant in tail is within the meaning of the statute, being virtually a tenant for life if he dies without barring the entail: but from the observations of Lord Eldon, in Hawkins *v.* Kelly, it would seem that the question in Whitfield *v.* Pinder turned upon the same point as Pagett *v.* Gee, (namely,) the actual payment of the rent by the lessee to the remainder-man; and, consequently, that Whitfield *v.* Pinder must have been an action by the executor of the deceased tenant in tail against the remainder-man, for the executor's portion of * the rent, as money had and received by the * 309 remainder-man for his (the executor's) use.] (*b*)

50. In the subsequent case of Vernon *v.* Vernon, where a per-

(*a*) 1 Burn. Jus. 483. Amb. 198. (*b*) 2 Bro. C. C. 662. 8 Ves. 312.

son held from year to year under a tenant in tail, the Court of Chancery decreed an apportionment. (*a*)

51. There, H. Vernon being tenant in tail of estates in the county of Sussex, died on the 17th of March, an infant, by which John Vernon, one of the plaintiffs, became tenant in tail of the estate: part of the lands was occupied by persons holding from year to year, under the guardian; and their rents were payable at Lady and Michaelmas-day, which demises expired by the death of H. Vernon. These rents having been paid to the receiver, the question was, whether the administratrix of H. Vernon was entitled to a proportion of the rents, or the remainder man was entitled to the whole. The Master reported, that a proportion of the rent was due to H. Vernon on the day of his death: to which the remainder-man took an exception, that he ought to have certified that no sum was due to H. Vernon on the day of his death, in regard that he was tenant in tail of the estates of which the Master certified the said rents or proportions to be due.

Lord Thurlow. "The case of Pagett and Gee seems rather to be a decision what the statute ought to have done than what it has done: but the question here seems to turn on another ground; that the tenant holding from year to year, or from period to period, from a guardian, without lease or covenant, cannot be allowed to raise an implication in his own favor, that he should hold without paying rent to any body.". The exception to the Master's report was overruled.

52. [In Hawkins *v.* Kelly, a lease of tithes was granted for years by a rector, reserving a rent payable annually; the lease ceased on his death, and the succeeding incumbent received from the lessee a sum of money as the rent due for the whole year, in the course of which the late rector died: it was decreed that the rent should be apportioned. Lord Eldon fully recognized the case of Pagett *v.* Gee, referring the decision to the principle before noticed. (*b*)

53. In Clarkson *v.* Lord Scarborough, where a tenant for life, with leasing power, having granted leases from year to
310* year, some *by parol and some in writing, but not con-

(*a*) 2 Bro. C. C. 659.
(*b*) 8 Ves. 308. See also Aynesly *v.* Wordsworth, 2 Ves. & Bea. 331.

formable to the power, died before the expiration of the year, it was decided that the rents were apportionable. (*a*)

*54. A similar decision was made in *ex parte* Smyth, where a parol demise from year to year was made by tenant for life, who had power to lease by deed.] (*b*) [1]

(*a*) 1 Swan. 354, note. See also Wykham *v.* Wykham, 3 Taunt. 331.
(*b*) 1 Swan. 337.

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[1] The appointment is to be made by the jury, who, upon the evidence offered, are to judge of the value of the land. Hodgkins *v.* Robson, 1 Vent. 276. Bliss *v.* Collins, 5 B. & Ald. 876. [The apportionment of rent reserved in a lease or grant among several assignees of the lessee, must be according to the value of the several parts held by each, and not according to the quantity, or number of acres. Van Rensselaer *v.* Gallup, 5 Denio, 454.]

TITLE XXIX.

DESCENT.

BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES. Book II. ch. 14.
KENT'S COMMENTARIES. Vol. IV. Lect. 65.
CHARLES WATKINS. An Essay toward the further Elucidation of the Law of Descents.
TAPPING REEVE. A Treatise on the Law of Descents in the several United States of America.
FLINTOFF on Real Property. Vol. II. B. I. ch. 6, 7.
STEPHEN'S COMMENTARIES. Book II. pt. 1, ch. 11.

The philosophical student, desirious of examining foreign laws of Descent and Succession, may profitably consult the following works:

BUNSEN. De Jure Hereditario Atheniensium.
JUSTINIAN'S INSTITUTES. Lib. III. with Cooper's Notes.
TAYLOR'S CIVIL LAW, pp. 537–544.
MONTESQUIEU. Spirit of Laws, Book XXVII.
TORRE. Tractatus tripartitus de Pactis futuræ Successionis.
VASQUIUS. De Successionibus et Ultimis Voluntatibus.
TILEMANNUS. Dissertatio de Successionibus Ascendentium, tam in Allodialibus quam in Feudis.
MONTVALON. Traité des Successions, etc.
POTHIER. Traités divers sur les Successions.
W. H. MACNAGHTEN. Principles and Precedents of Moohummudan Law. Book I. ch. 1, 2.
ORIANNE. Traité original des Successions, d'après le Droit Hindou, etc.
N. B. E. BAILLIE. The Moohummudan Law of Inheritance.
N. B. HALHED. Code of Gentoo Laws. Ch. II.
H. T. COLEBROOK. A Digest of Hindu Law, etc.

CHAP. I.

TITLE TO THINGS REAL.

CHAP. II.

DESCENT AND CONSANGUINITY.

CHAP III.

RULES OR CANONS OF DESCENT.

CHAP. IV.

DESCENT OF ESTATES IN REMAINDER AND REVERSION.

CHAP. V.

DESCENT BY STATUTE AND CUSTOM.

CHAP. I.

TITLE TO THINGS REAL.

SECT. 2. *Description of a Title.*
3. *Possession.*
4. *Effect of an Entry.*
6. *Right of Possession.*
9. *Apparent or actual.*
SECT. 12. *Right of Property.*
13. *Discontinuance of Estates.*
16. *What constitutes a complete Title.*
18. *Remitter.*

SECTION 1. Having treated of the several kinds of real property, both corporeal and incorporeal, and of the estates that may be had therein, it will now be necessary to consider the title to real property, with the manner in which it may be acquired or lost.

2. A title is thus described by Lord Coke, *Titulus est justa causa possidendi id quod nostrum est;* or, it is the means whereby the owner of the lands or other real property has the just and * legal possession and enjoyment of it. And Sir W. *312 Blackstone observes that there are several stages or degrees requisite to form a complete title to lands and tenements. (*a*)

3. The *first degree of title* is the *bare possession*, or actual occupation of the estate; without any apparent right, or any pretence of right to hold and continue such possession. This may happen where one man disseises another; or where, after the death of the ancestor, and before the entry of the heir, a stranger abates and holds out the heir. In these cases the disseisor or abator has only a mere naked possession, which the rightful owner may defeat by an entry on the land: but in the mean time till some act is done by the rightful owner to divest this possession, and assert his title, such actual possession is

(*a*) 1 Inst. 345 b. 2 Bl. Comm. c. 13.

primâ facie evidence of a legal title in the possessor; and it may by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasable title. At all events, without such actual possession, no title can be completely good.†

4. The necessity of an entry by the heir, upon the death of the ancestor, or, where that is prevented, of a continual claim,‡ has been already stated.[1] In the case of a disseisin or ouster of the freehold, there must also be an entry; and if there be two disseisors, the disseisee must make his entry on both; or if one disseisor has conveyed the lands, with livery to two or three persons, an entry must be made on each of them: but if the disseisor has let the lands to several persons for years only, an entry on one of the lessees, in the name of the whole, will be sufficient to revest all. (*a*)

5. The effect of an entry or claim [previously to the late statute of limitations,] was to put the person who entered or claimed into the actual possession and seisin in deed of the lands. Thus Littleton says:—"By such entry he shall have as good a possession and seisin of all the lands and tenements whereof he hath title of entry, as if he had entered in deed into every parcel." And speaking of continual claim, he says:—"Presently by such claim he hath a possession and seisin in the lands, as well
313 * as if * he had entered in deed; although he never had possession or seisin of the same lands, or tenements before the said claim. (*b*) §

(*a*) Tit. 1, s. 23, 26. 1 Inst. 252 b. (*b*) Lit. s. 417, 418, 419.

† [By stat. 3 & 4 Will. 4, c. 27, s. 14, it is enacted that any acknowledgment of title given in writing to the person entitled, or to his agent, shall be deemed equivalent to possession or receipt of rent at the time of such acknowledgment.]

‡ [Abolished, stat. 3 & 4 Will. 4, c. 27, s. 11.]

§ [Abolished by stat. 3 & 4 Will. 4, c. 27, s. 11, which also enacts, s. 39, that no descent cast after the 31st December, 1833, shall toll or defeat a right of entry or action for the recovery of land; and it also enacts, s. 10, that by mere entry no person shall be deemed to have been in possession within the meaning of that act.]

[1] In the United States, the general doctrine is, that no entry is necessary where the ancestor died actually seised, or where the possession was vacant, the ancestor having the right. See tit. 1, § 23, note (2), and cases there cited. Ib. § 31, note (1.) 4 Kent, Comm. 385—389. In most of the States, it is provided, either in express language of the statutes, or by necessary implication, that every right, title, and interest of the ancestor, in lands, tenements, and hereditaments, whether legal or equitable, shall descend to and vest in the heirs. See *post*, ch. 3, § 1, note (1.)

6. The next step to a good and perfect title is the *right of possession*, which may exist in one man, while the actual possession is in another. Thus, in the case of a disseisin, abatement, or intrusion, the right of possession is in the disseisee or the person on whom the abatement or intrusion has been effected, who may exert it whenever he thinks proper, by an entry; and the actual possession is in the disseisor, abator, or intruder.

7. In the case of a disseisin, abatement, or intrusion, the descent of the lands to the heir of the disseisor, or abator, or intruder, [before the recent statute of limitations] tolled, that is, took away, the entry of disseisee, &c.; † for the law presumed that the possession, which was transmitted from the ancestor to the heir, was rightful, until the contrary was shown; so that, in general, no person could recover possession by mere entry on lands, which another had by descent. It is, however, enacted by the statute 32 Hen. VIII. c. 33, that the dying seised of any disseisor, of or in any manors, &c., having no right or title therein, shall not be taken or deemed to be such descent in law, for to toll or take away the entry of any persons, except that such disseisor hath had the peaceable possession of such manors, &c., whereof he shall so die seised, by the space of five years next after the disseisin, without entry or continual claim. (*a*) [1]

(*a*) 1 Inst. 237 b. Plowd. 545. 2 Saund. R. 7 a. Tit. 31, c. 2.

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† [Abolished by the same stat. s. 11.]

[1] This statute has been substantially reënacted in *Georgia;* Rev. St. 1845, p. 467, § 12, by Hotchkiss; and in *South Carolina;* Stat. at Large, Vol. II. p. 472; and in *Mississippi;* Rev. St. 1840, ch. 34, § 64, p. 357. In several other States it is expressly enacted that a descent cast shall not take away or impair any right of entry. See *New York*, Rev. St. Vol. II. p. 393, § 15, 3d ed.; *Vermont*, Rev. St. 1839, ch. 58, § 8; *Arkansas*, Rev. St. 1837, ch. 91, § 3; *Missouri*, Rev. St. 1845, ch. 109, § 3. In *Massachusetts*, and in *Indiana*, it is provided that no descent *or discontinuance* shall defeat or take away any right of entry *or action*. Mass. Rev. St. ch. 101, § 5. Indiana, Rev. St. 1843, ch. 45, § 7. In *Maine*, the provision, so far as regards the right of entry, is the same. Maine, Rev. St. 1840, ch. 145, § 8. In those States which have adopted the common law, and have not changed it by statute, it is presumed that the rule of the stat. 32 Hen. 8, c. 33, would be recognized.

The statute does not seem to apply to cases where the party has no other remedy but entry; as, if there be a devise of lands, and after the death of the testator, the heir, before entry by the devisee, enters and dies seised. Here, the devisee may still enter; for otherwise he would be without remedy. 1 Inst. 240 *b*. Angell on Lim. p. 62. The descent, to take away entry, must also be an immediate descent; as, if a *feme* disseisor take husband, have issue, and die, the descent to the issue does not take away

8. Where a person who had a right of entry, was under any legal disability, such as infancy, coverture, imprisonment, insanity, or absence from the realm, a descent would not take away the right of entry. (*a*) †

9. The *right of possession* is of *two sorts;* an *apparent right* of possession, which may be defeated by proving a better; and an *actual right* of possession, which will stand the test against all opponents. Thus, where a person was disseised, the dis-
314* seisor had only the naked possession, because the *dis-
seisee might enter and evict him; but against all other persons, the disseisor had a right, and in this respect only could be said to have the right of possession; for, in respect of the disseisee, he had no right at all. When a descent was cast, the heir of the disseisor acquired the *jus possessionis*, because the disseisee could not enter upon his possession, and evict him, but was put to his real action. (*b*)

10. If a disseisor died after five years' quiet possession, and the disseisee entered, the heir of the disseisor might maintain an ejectment; for the right of possession belonged to him, though the mere right was in the disseisee. (*c*) ‡

11. Where the person who had the actual right of possession, made his claim, and brought his action, within the time prescribed by the former statutes of limitation, and could prove by what unlawful means the person in possession acquired his seisin, he would then, by judgment of law, recover that possession to which he had such actual right. But if he omitted to bring his possessory action within the limited time, his adversary might imperceptibly gain an actual right of possession. (*d*)

12. When the right of possession was gained, the party kept

(*a*) Lit. s. 402. (*b*) Gilb. Ten. 21. Lit. s. 385. 1 Salk. 685. *Ante*, s. 7.
(*c*) Smith *v.* Tyndal, 2 Salk. 685. (*d*) Tit. 31, c. 2. 11 Mod. 104.

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the entry of the disseisee, because it was impeded by the interposition of the tenancy by the curtesy. Carter *v.* Tash, 1 Salk. 241, per Holt, C. J.

The statute is not restricted to actual expulsions, but extends to all disseisins whereby, on the death of the disseisor, a descent in fee was cast on the heir. Tolman *v.* Sparhawk, 5 Met. 469, 478.

† [See the same stat. ss. 14, 15, 16.]

‡ [By stat. 3 & 4 Will. 4, c. 28, s. 39, it is enacted that no descent cast after the 31st December, 1833, shall toll or defeat a right of entry or action for the recovery of land.]

out of possession had nothing left in him but the *mere right of property*, or *jus proprietatis*, without either possession, or the right of possession; and his estate was then said to be devested and turned to a right. It was devested, because the right owner was turned out of possession; and it was turned to a right, because the right of possession, and consequently the right of entry was lost; and nothing was left but the *jus merum*, or mere right of property; which could not be regained by a possessory, but only by a real action.†

13. By the common law, where the right of entry into lands is lost, and the person can only recover by a real action, the estate is said to be discontinued. Thus Lord Coke says, a *discontinuance of estate* in lands or tenements is properly, in legal understanding, an alienation made or * suffered by *315 tenant in tail, or any that is seised *in auter droit*, whereby the issue in tail, or heir, or successor, or those in remainder or reversion, are driven to their action, and cannot enter. (*a*)

14. The instances of discontinuance mentioned by Littleton, s. 593, are, 1. Where an abbot aliened the lands whereof he was seised *jure ecclesiæ;* in which case his successor could not enter into them, although the right was in him, but was put to his action. 2. Where a man, seised in right of his wife, enfeoffed another and died; the wife could not enter, but was put to her action. 3. Where a tenant in tail of land enfeoffs another, and has issue, and dies; the issue may not enter into the land, albeit he hath right and title to it, but is put to his action.

15. In consequence of this doctrine, it was long settled, that where a tenant in tail discontinued the estate tail, which he might do by feoffment or fine, the person to whom the estate tail was transferred by these assurances acquired the right of possession; and nothing remained in the issue in tail but the mere right of property. (*b*)‡

(*a*) 1 Inst. 325 a. (*b*) Tit. 2, c. 2.

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† [See section 36 of the late stat. of Limitations, s. 36, by which all real and mixed actions are abolished, except a writ of right of Dower, or writ of Dower *unde nihil habet*, a *quare impedit*, or an ejectment.]

‡ [But now by the recent statute of limitations 3 & 4 Will. 4, c. 27, s. 39, it is enacted that no discontinuance after the 31st December, 1833, shall defeat any right of entry or action.] Similar statutes exist in *Maine*, Rev. St. 1840, ch. 115, s. 8;

16. The *union* of the *possession*, the *right of possession*, and the *right of property*, constitute a *complete title* to lands, tenements, and hereditaments. For it is an ancient maxim of law that no title is completely good unless the right of possession be joined with the right of property, which is then denominated a double right. And when to this double right the actual possession is also united; where there is, according to the expression of Fleta, *juris et seisinæ conjunctio;* then, and then only, is the title completely legal. (*a*)

17. Lord Coke has thus stated the whole of this doctrine;—"It is to be known that there is *jus proprietatis*, a right of ownership; *jus possessionis*, a right of seisin or possession; and *jus proprietatis et possessionis*, a right both of property and possession. And this is anciently called *jus duplicatum*, or *droit droit.* For example, a man may be disseised of an acre of land, the disseisee hath *jus proprietatis*, the disseisor hath *jus possessionis;* and if the disseisee release to the disseisor, he hath *jus proprietatis et possessionis.*" (*b*)

316 * 18. * Littleton says, s. 659, that where a man has two titles to lands, one a more ancient, and the other a later title, if he comes to the land by the later title, yet the law will adjudge him in by force of the elder title, because it is the most sure.[1] And when a person is adjudged in by force of his elder title, this is said to be a *remitter* in him; as if tenant in tail discontinues his estate; afterwards disseises the discontinuee, and so dies seised, whereby the tenements descend to his issue, or cousin, inheritable by force of the entail, such issue or cousin is remitted to the estate tail, as his elder title. For if he should be in by force of the descent, then the discontinuee might have a writ of entry *sur disseisin* † against him, and should recover the tenements; but inasmuch as he is in his remitter, by force of the tail, the title and interest of the discontinuee is taken away and defeated.

(*a*) 1 Inst. 266 a. (*b*) Idem.

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and in *Massachusetts*, Rev. St. 1836, ch. 101, s. 5. *Ante*, s. 7, note (1); and see tit. 2, ch. 2, s. 7, 12, notes.

[1] [Where the same quantity and quality of estate that the devisee would have acquired by descent, is devised, the worthier title passes, that is, the one by descent. Gilpin *v.* Hollingsworth, 3 Md. 190. In such case the devise is void, and the heir takes by descent. Ellis *v.* Page, 7 Cush. 161; Buckley *v.* Buckley, 11 Barb. Sup. Ct. 43.]

† [Now abolished by stat. 3 & 4 Will. 4, c. 27, s. 36. See also ss. 37, 38.]

19. A principal cause why such heir, in the case aforesaid, and in other like cases, shall be said in his remitter, is, because there is not any person against whom he may sue his writ of formedon; for against himself he cannot sue, and he cannot sue against any other, none other being tenant of the freehold. For this cause the law doth adjudge him in his remitter, *scilicet*, in such plight as if he had lawfully recovered the same land against another. (*a*)

20. Sir W. Blackstone has observed, that if the subsequent estate or right of possession be gained by a man's own act or consent, as by immediate purchase, being of full age, he shall not be remitted.[1] For the taking such subsequent estate was his own folly, and shall be looked upon as a waiver of his prior right; therefore it is to be observed, that to every *remitter* there are regularly these *incidents;* an *ancient right*, and a *new defeasible estate of freehold*, uniting in one and the same person; which defeasible estate must be *cast upon the tenant*, not gained by his own act, or folly. (*b*)

21. Lord Coke, however, says, that a man shall not be remitted to a right remediless, for the which he can have no action; as if the issue in tail be barred by the fine or warranty † of his ancestor, and the freehold is afterwards cast upon him, he shall *not be remitted to his estate tail, because he could not *317 have recovered it by an action. (*c*)

22. The *modes of acquiring a title* to real property are *two* only; *descent* and *purchase*. The *former*, where the title is vested in a person by the single *operation of law;* the *latter*, where the title is vested by the *person's own act and agreement.* (*d*)[2]

(*a*) Lit. s. 661. (*b*) 3 Bl. Com. 20. Id. 190.
(*c*) 1 Inst. 349 b. Moo. 115. *Vide* 1 Sanders' Uses, c. 2, s. 6. (*d*) I Inst. 18 b.

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† [No bar to a right of entry or action now, by stat. 3 & 4 Will. 4, c. 27, s. 39.]

[1] This, it is conceived, applies only to the case where the heir *takes an estate* by the conveyance, as, for example, by deed with warranty; and not to a mere *release*, operating only as an extinguishment of the right of the releasor. See Fox *v.* Widgery, 4 Greenl. 214; Blight *v.* Rochester, 7 Wheat. 535.

[2] Mr. Hargrave thought it more accurate to say that the title to land is either by *purchase*, to which the act or agreement of the party is essential; or by mere *act of law;* of which latter kind the title by descent and the title by escheat are only examples.

For, strictly speaking, the title by escheat is a title neither by purchase nor descent; but a compound of both; the right to take possession accruing by operation of law, upon the death of the tenant without heirs; and yet the act of the lord being necessary, to put himself into possession. See 1 Inst. 18 b, note 106. This distribution, unquestionably just, is approved by Chancellor Kent. 4 Kent, Comm. 373.

CHAP. II.

DESCENT AND CONSANGUINITY.

SECT. 1. *Nature of Descent.*
3. *What goes to the Heir.*
5. *Consanguinity.*
7. *Who may be Heirs.*
8. *They must be Legitimate.*
12. *And natural-born Subjects.*
SECT. 19. *Or naturalized, or made Denizens.*
20. *A Title may be deduced through an Alien.*
21. *Persons attainted can neither inherit nor transmit.*
24. *Corruption of Blood.*

SECTION 1. Descent, or hereditary succession, is the title whereby a person on the death of his ancestor acquires his estate, as his *heir at law*. An *heir*, therefore, is *he upon whom the law casts the estate* immediately *on the death of the ancestor*,[1] and an estate so descended on the heir is, in law, called the *inheritance*.

2. Although the right of inheriting be known to the laws of every civilized country, and is founded on the best principles of reason, yet it is not derived from natural law, or which can belong to any man in a state of nature; from which it follows that the numerous and arbitrary rules by which its course is either directed or interrupted can never properly be esteemed or objected to, as violations of natural justice. Our laws of descent are derived from feudal principles, and differ essentially from the Roman law of succession; for with us the heir succeeds as related to the ancestor in blood, and designated to inherit the estate, by the terms of the grant. (*a*)

(*a*) Dissert. c. 1.

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[1] Upon the death of an ancestor, an estate in fee is presumed to descend, in pursuance of the law of inheritance, unless the descent is shown to have been interrupted by a devise. Baxter *v.* Bradbury, 7 Shep. 260. [The heir at law cannot be disinherited except by express devise or necessary implication, and if the estate is not devised to some other person, though the intention be ever so manifest to disinherit the heir, the law still casts the estate upon the heir. Wright *v.* Hicks, 12 Geo. 155; Finley *v.* Hunter, 2 Strobh. Eq. 208; Haxtun *v.* Corse, 2 Barb. Ch. R. 506; Gage *v.* Gage, 9 Foster, N. H. 533.]

3. Not only every thing which falls under the denomination of *real estate* descends to the heir, but also *heir looms*, and all *such other chattels as are annexed to*, or *connected with the freehold;* as wainscots, benches, doors, windows, and the like. (*a*)[1]

4. Every species of *tree*, whether timber or not, standing on the land at the death of the ancestor, together with the *grass* actually growing, though ripe for cutting, *descend to the*
319* *heir.* *But corn and all other vegetables *produced annually by labor and cultivation*, go to the *executor* or *administrator* of the ancestor, as a compensation for the expense of raising them. (*b*)[2]

(*a*) Tit. 1, § 5–9. (*b*) Tit. 1, § 5–9.

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[1] The principle of the distinction between real and personal estate, is stated and illustrated in tit. 1, s. 7, 8, 9. A survey of lands, preliminary to a purchase from the State, but not perfected by grant, is a descendible interest. Hansford *v.* Minor, 4 Bibb, 385. And if the lands were located and surveyed by the ancestor, and after his decease are patented to the heirs, they take by descent, and not by purchase. Bond *v.* Swearingen, 1 Ham. 395; Frizzle *v.* Veach, 1 Dana, 211. See also Workman *v.* Gillespie, 3 Yeates, 571; [Gilpin *v.* Hollingsworth, 3 Md. Ch. Decis. 190. An interest in a contract for the purchase of land is real estate, and descends to the heirs of the purchaser. Griffith *v.* Beecher, 10 Barb. Sup. Ct. 432. Rent accruing out of land upon a lease granted by the owner in fee, and which does not become due until after the death of the lessor, is a chattel real, and descends to the heir. Green *v.* Massie, 13 Ill. 363.]

A contingent interest, also, is descendible. Thus, where one devised an estate to A for life, on condition subsequent, and the residue of his estate absolutely to B, and A did not perform the condition; it was held that B's interest, though he died before the breach, descended to his heirs. Clapp *v.* [Stoughton, 10 Pick. 463. And see Chauncy *v.* Graydon, 2 Atk. 621; Massey *v.* Hudson, 2 Mer. 133. [Hicks *v.* Pegues, 4 Rich. Eq. 413; Nimmo *v.* Davis, 7 Texas, 26.]

So, lands purchased by the intestate at a sale for non-payment of taxes, descend to his heir, though the deed had not been made to the ancestor. Rice *v.* White, 8 Ham. 216. See also Avery *v.* Dufrees, 9 Ham. 145. [See, also, North *v.* Philbrook, 34 Maine, (4 Red.) 532; Kline *v.* Bowman, 19 Penn. (7 Harris,) 24; Dalrymple *v.* Taneyhill, 4 Md. Ch. Decis. 171; Betts *v.* Wirt, 3 Ib. 113. Where a deed conveys no estate, the land descends to the heir, who is not bound to restore the consideration-money. Flanders *v.* Davis, 19 N. H. 139. And where a testator has a right to set aside a voidable conveyance, this is an equitable estate in him, descendible to his heir. Stump *v.* Gaby, 17 Eng. Law & Eq. 357. And where a trustee, in violation of the trust, buys land with the money of the *cestui que trust*, and takes the deed to himself, the estate descends to the heirs. Reid *v.* Fitch, 11 Barb. Sup. Ct. 399. See also, Martin *v.* Price, 2 Rich. Eq. 412; Lindsay *v.* Pleasants, 4 Ired. Eq. 320; Asay *v.* Hoover, 5 Barr, 21.]

[2] See Toller's Law of Executors, Book II. ch. 2, § 1, 2. Ibid. ch. 4, § 1, 2. As between heir and executor, the rule of succession obtains with the most rigor in favor of the inheritance, and against the right to consider as a personal chattel any thing

5. The doctrine of descents, or law of inheritance in fee simple, depends on the nature of kindred, and the several degrees of consanguinity. It will, therefore, be first necessary to state the true notion of this kindred or alliance in blood. *Consanguinity* or kindred is defined to be *vinculum personarum ab eodem stipite descendentium;* the connection or relation of persons descended from the same stock. It is either lineal or collateral. *Lineal* consanguinity is that which subsists between persons of whom one is descended in a right line from the other; as between father, grandfather, and great-grandfather. Every generation in this direct lineal consanguinity constitutes a degree, reckoning either upwards or downwards. *Collateral* consanguinity is that which subsists between persons lineally descended from the same ancestor, who is the *stirps*, trunk, or common stock, but who do not descend the one from the other; as brothers, and the children, grandchildren, &c. of brothers.

6. The *method of computing the degrees of consanguinity* by the *canon law*, which our law has adopted,[1] is as follows:—We begin at the common ancestor, and reckon downwards; and in whatever degree the two persons, or the most remote of them, is

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which has been affixed to the freehold. 2 Kent, Comm. 345. See, also, 2 Burge on Col. and For. Laws, p. 6–31. Amos and Ferard on Fixtures, ch. 2, § 3, 4.

[1] In the United States, the degrees of consanguinity are generally, and it is believed universally, computed by the rule of the *civil* law. 4 Kent, Comm. 412. In both the civil and the canon law, each person, in the ascending and descending line, constitutes a degree, omitting the party counted from. The two methods differ only in computing the collateral degrees.

By the *Civil Law*, the rule is to count from the *præpositus* up to the common ancestor, and then downwards, *from* the common ancestor (excluding him) to the other party in question, reckoning a degree for each generation. Thus G. and A. are in the *fourth* degree, by either rule. And by the civil law, N. and C. are in the *fifth* degree, and N. and K. in the *eighth*.

A.

C. B. D.
H. E. L.
I. F. M.
K. G. N.

But by the *Canon Law*, the computation is made by counting only from the common ancestor down to the party most remote from him, if the line is unequal, or to either party, if they are in equal degree. Thus, by the canon law, both N. and C., and N. and K., are in the *fourth* degree. 1 Inst. 23 *b*, note [142] by Ld. Hale.

The rule of the canon law is said to have originated in the cupidity of the Church of Rome; inasmuch as it brings a larger number of marriages within the prohibited degrees, thereby increasing the demand for dispensations. See 2 Bl. Comm. 224; Cooper's Justinian, p. 424; Dig. lib. 38, tit. 10; Wood's Civil Law, p. 116; Poynter on Marriage and Divorce, p. 96–105.

distant from the common ancestor, that is the degree in which they are said to be related. (*a*)

7. With respect to the *persons* who are *capable of claiming* an estate in fee simple, *as the heirs* of one who died seised thereof, they must be first *legitimate;* secondly, *natural-born* subjects, or *naturalized*, or made *denizens;* thirdly, *not attainted* of treason or felony, or claim through any ancestor who was attainted of treason or felony.

8. No person can succeed to an estate as heir, who is not *born in lawful matrimony;* for it is a maxim of law, that *hæres legitimus est quem nuptiæ demonstrant;* and a *bastard* being *filius nullius*, can neither inherit from his father nor mother; consequently, can have no heirs but his own children. (*b*) [1]

(*a*) 1 Inst. 23 b.

(*b*) (Cooley *v.* Dewey, 4 Pick. 93. Barwick *v.* Miller, 4 Desaus. 434. Stover *v.* Boswell, 3 Dana, 233. Flintham *v.* Holder, 1 Dev. Eq. R. 345. Doe *v.* Bates, 6 Blackf. 533.)

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[1] In regard to the right of illegitimate children to inherit, the regulations in the United States are somewhat various. The severe rule of the common law is believed still to exist only in *New Jersey*, *Pennsylvania*, *Delaware*, and *South Carolina*.

In some of the States, the general rule is, that the illegitimate child and his mother shall succeed to each other, *in the same manner as if he were lawfully begotten;* leaving it to be inferred that the mother's kindred, and the brothers and sisters of the bastard, were to be admitted into the succession. Such seems to be the law in *Maine*, *New Hampshire*, *Vermont*, *Rhode Island*, *Missouri*, *Virginia*, *Indiana*, *Kentucky*, *Connecticut*, and *Florida*.

In *New York* and *Michigan*, the *mother, and her relatives if she be dead*, are expressly declared to be entitled to the estate of her illegitimate child.

In *Maryland*, illegitimate children *succeed to their mother, and to each other*, and *to the descendants of each other*, as if born in lawful wedlock. Stat. 1825, ch. 156; 1 Dorsey's Laws of Maryl. p. 835; Brewer *v.* Blougher, 14 Pet. 178; [Earle *v.* Dawes, 3 Md. Ch. Decis. 230.] So also in *Kentucky*, by Stat. 1840, ch. 356; and as if of the whole blood.

In some other States, the rule is, that illegitimate children succeed to the *mother*, but *not to her kindred*. This is the case in *Massachusetts*, *Michigan*, *Georgia*, *Ohio*, and *Arkansas*. [This does not apply to grandchildren, and if an illegitimate child dies before its mother, his children do not inherit her estate. Curtis *v.* Hewins, 11 Met. 294.] The same rule, in *North Carolina* and *Tennessee*, is qualified by the express condition that she have no lawful issue; and in *Illinois*, that she remain unmarried.

Illegitimate children *succeed to each other*, by the law of *North Carolina*, *Georgia*, *Tennessee*, *Vermont*, and *Connecticut*. [Allen *v.* Donaldson, 12 Geo. 332.]

The *mother alone* succeeds to her illegitimate child, by the law of *Massachusetts* and *Ohio*.

The methods by which *a bastard may be rendered legitimate*, and the effect thereof in regard to the extent of his capacity to inherit, are also various in different States.

In *Louisiana*, a distinction is admitted between "*bastards*," and "*natural children*." The former never inherit; the law allowing them nothing more than a mere alimony.

9. By the old law, if the husband was within the four seas, and his wife had issue, no evidence would be admitted to prove such issue a bastard, unless the husband was incapable of procreation. But Mr. Hargrave has observed that this was never *an universal rule; and that it has been long set- *320 tled, that not only proof of being out of the kingdom, but also every other kind of evidence tending to prove the impossibility, or even improbability, of the husband's being the father, is admissible. And in the late claim to the earldom of Banbury, the House of Lords adhered to this principle. (*a*)

(*a*) 1 Inst. 126 a, n. 2. Goodright *v.* Saul, 4 Term R. 356. Tit. 26, c. 3. Head *v.* Head, 1 Sim. & Stu. 150.

"Natural children" are those who have been acknowledged by either parent, by a solemn act, in the form prescribed by law; in which case they succeed to that parent,—namely,—to the mother, if she have no lawful issue; and to the father, if he have neither lawful issue, wife nor kindred. Civil Code, Louis. Art. 220, 221, 912, 913.

By the law of *Vermont*, a bastard may be legitimated by a formal and solemn act of the father, by deed, attested by three witnesses, and duly acknowledged before a magistrate and recorded; whereby the child is rendered legitimate, to all intents and purposes.

In *Maine*, he may be legitimated by the father, by any writing distinctly acknowledging his paternity, and attested by a competent witness. But in this case the child succeeds only to the father; and not to his kindred. [Hunt *v.* Hunt, 37 Maine, (2 Heath,) 333.]

In *North Carolina*, he may be legitimated by act of Court, on the petition of the father, and proof of the marriage of the parents, or of the death of the mother, or of her marriage with another person, or of her residence without the State, and that the petitioner is the reputed father. But here also, as in Maine, the child can succeed only to the father. 1 Rev. St. p. 91, 92.

A more common mode of legitimation is by the intermarriage of the parents, and the acknowledgment of the child as his own by the father; which is shown by the usual acts of adoption and care of the child, as the lawful issue are cared for; in which case the child is rendered legitimate, to all intents and purposes. This method is permitted by the statutes of *Maine*, *Vermont*, *Maryland*, *Michigan*, *Virginia*, *Kentucky*, *Mississippi*, *Ohio*, *Indiana*, *Illinois*, *Missouri*, *Alabama*, and *Arkansas*.

By a similar act of the parents, in *Massachusetts*, the child is rendered legitimate as to the parents and their issue only; but is not allowed to claim, as representing his parents, any estate of their kindred, either lineal or collateral.

The issue of marriages deemed null, are rendered legitimate by the statutes of *Virginia*, *Kentucky*, and *Missouri*.

See Maine, Rev. St. 1840, ch. 93; N. Hamp. Rev. St. 1842, ch. 106; Mass. Rev. St. 1836, ch. 61; Rhode Island, Rev. St. 1844, p. 233; Conn. Rev. St. 1849, p. 357, 358; Heath *v.* White, 5 Conn. 228; Brown *v.* Dye, 2 Root, 280; Verm. Rev. St. 1839, ch. 52; Burlington *v.* Fosby, 6 Verm. 83; N. York, Rev. St. Vol. II. p. 37; Maryl. St. 1820, ch. 191; Virg. Tate's Dig. p. 280; Ash *v.* Way, 2 Gratt.

10. With respect to *posthumous children*, the rule formerly was, that they must be born within nine months, or forty weeks, after the death of the husband. But now the Courts consider nine months merely as the usual time, and do not decline exercising the discretion of allowing a longer space, where the opinion of physicians or the circumstances of the case have required it.[1] In a late instance, upon an issue directed out of Chancery, a child born forty-three weeks, except one day, after the husband's death, was found to be legitimate. (*a*)

11. Where a widow is suspected of feigning herself pregnant, with a view to produce a supposititious child; the presumptive heir may have a writ *de ventre inspiciendo*, to examine whether

(*a*) 1 Inst. 123 b, n. 1. Hargrave's Jurid. Exer. Vol. III. 409. Foster *v.* Cook, 3 Bro. C. C. 347.

203; N. Car. Rev. St. 1837, Vol. I. ch. 38; Ib. ch. 12; Waggoner *v.* Miller, 4 Ired. 480; Flintham *v.* Holder, 1 Dev. Eq. R. 345; Georgia, Rev. St. 1845, ch. 18; Ky. Rev. St. 1834, tit. 61, p. 563; Stover *v.* Boswell, 3 Dana, 233; Tennessee, Car. & Nich. Dig. p. 247–250; Ohio, Rev. St. 1841, ch. 39; Ind. Rev. St. 1843, ch. 28, art. 5; Doe *v.* Bates, 6 Blackf. 533; Ill. Rev. St. 1839, p. 697–698; Missouri, Rev. St. 1845, ch. 50; Florida, Thomp. Dig. p. 188, 189; Michigan, Rev. St. 1846, ch. 67; Mississippi, Rev. St. 1840, ch. 36; Porter *v.* Porter, 7 How. 107; Alabama, Toulm. Dig. p. 885, 886; Hunter *v.* Whitworth, 9 Ala. R. 965; Arkansas, Rev. St. 1837, ch. 49. And see, on the general subject, 4 Kent, Comm. 413–417.

[1] The law in the United States, in regard to posthumous children, is presumed to be the same as in England, even in those States which have no legislation on the subject. 4 Kent, Comm. 389; Burdett *v.* Hopegood, 1 P. Wms. 486; 4 Dane, Abr. 540, § 13; Ibid. 545, § 15. But in some States it is expressly enacted that a posthumous child, born alive, shall be considered as if living at the decease of the parent. See *Massachusetts*, Rev. St. ch. 61, § 13; *New York*, Rev. St. Vol. II. p. 38, § 18, 3d ed; *New Jersey*, Rev. St. 1846, tit. 10, ch. 2; *Pennsylvania*, Dunlop's Dig. 506, 507; *Michigan*, Rev. St. 1838, p. 269, § 13; *Illinois*, Rev. St. 1839, p. 698; *Missouri*, Rev. St. 1845, ch. 50, § 2, p. 421; *Indiana*, Rev. St. 1843, ch. 28, Art. 5; *Arkansas*, Rev. St. 1837, ch. 49, § 2, p. 328; *Delaware*, Rev. St. 1829, p. 314; *Maryland*, Stat. 1820, ch. 191. In other States, the same rule is necessarily implied in other statute provisions. See *Maine*, Rev. St. 1840, ch. 1, § 3, Rule 9; *New Hampshire*, Rev. St. 1842, ch. 1, § 16; *Vermont*, Rev. St. 1839, ch. 4, § 7; *Virginia*, Tate's Dig. 278, § 13; *North Carolina*, Rev. St. Vol. I. ch. 38, § 1, Rule 7, p. 237; *Florida*, Thomp. Dig. 189, § 12; *Kentucky*, Rev. St. Vol. I. tit. 61, § 11, p. 561. And see *ante*, tit. 16, ch. 4, § 13, note; 24 Am. Jur. p. 3, note. [Morrow *v.* Scott, 7 Geo. 535; Watkins *v.* Flora, 8 Ired. Law, (N. C.) 374; Bishop *v.* Hampton, 11 Ala. 254. Where once a marriage has been proved, nothing can impugn the legitimacy of the issue short of the proof of facts showing it to be impossible that the husband could be the father. Patterson *v.* Gaines, 6 How. U. S. 550; Cannon *v.* Cannon, 7 Humph. 410.]

she be pregnant or not; and if she be pregnant, to keep her under a proper restraint, till she be delivered. (*a*)

12. No person is capable of inheriting lands unless he is a *natural-born subject;* or *naturalized* by act of parliament, or made a *denizen* by the King's letters-patent.[1] By the common law every person born out of the King's dominion or allegiance, was deemed an alien. But by the statute 25 Edw. III. st. 2, it was enacted that all children born abroad, whose fathers and mothers were, at the time of their birth, in allegiance to the King, and the mother had passed the seas with her husband's consent, might inherit, as if born in England.

13. By the statute 7 Ann. c. 5, it is enacted, that the children of all natural-born subjects, born out of the allegiance of her Majesty, her heirs or successors, shall be deemed to be natural-born subjects. And by the statute 4 Geo. II. c. 21, reciting that doubts had arisen respecting the construction of the statute 7 Ann., it is enacted that all children born out of the ligeance of the Crown of England, or which should be born out of such ligeance, whose fathers were or should be natural-born subjects at the time of the birth of such children, should by virtue of the said act of 7 Ann., and of this act, be adjudged to be natural-born subjects, provided their fathers were not attainted of high * treason, or liable to the penalties of high treason, in *321 case of their returning to Great Britain or Ireland, or in the service of any State in enmity with the Crown of England.

(*a*) 1 Inst. 8 b, n. 1. 128 b, n. 1.

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[1] In most of the United States, aliens are habilitated and enabled to take, hold and convey real estate; though in several of the States this faculty is granted only on certain conditions. See tit. 1, § 39, note 2, for a more particular statement of this subject. In the statutes of *New York*, *New Jersey*, *Delaware*, *Virginia*, *North Carolina*, *Ohio*, *Kentucky*, *Indiana*, *Illinois*, and *Missouri*, the impediment to a title by descent, arising from alienage in an ancestor through whom the title must be derived, is expressly taken away. But it has been held that the statute of New York does not enable a person to deduce title through an alien ancestor who is still living; and such, it is presumed, would be the exposition of similar statutes in other States. The People *v.* Irvin, 21 Wend. 128; McCreery *v.* Somerville, 9 Wheat. 354. [See McGregor *v.* Comstock, 3 Comst. (N. Y.) 408; and in *Massachusetts*, St. 1852, ch. 29, and cases cited in note to title 1, § 39, Vol. I. p. 60, (* 53). And in *Tennessee*, if the heir of the person last seised is an alien, but resident in the United States at the death of the ancestor, and within one year from his death, shall declare his intention to become a citizen according to the Act of Congress, he shall be entitled to succeed as heir to the real estate. Stat. 1848, ch. 165, § 4.]

14. [By the statute 13 Geo. III. c. 21, it is enacted, that all persons born out of the ligeance of the Crown of England, whose fathers were or should be, by virtue of the statutes 7 Ann., and 4 Geo. II., entitled to the rights and privileges of natural-born subjects, should be deemed natural-born subjects. In consequence of these statutes, all persons born out of the King's ligeance whose fathers and grandfathers were natural-born subjects, are held to be natural-born subjects, and as such are capable of inheriting.]

15. It was held in the reign of Charles I., that under the statute 25 Edw. III., the child of an English merchant, born abroad, whose mother was an alien, should inherit. This determination was founded on the principle, that the words of the statute 25 Edw. III., "*whose fathers and mothers*," should be construed in the disjunctive. But this mode of construction has been denied in the following case. (*a*)

16. Henrietta Knight, a natural-born subject, quitted the kingdom, and married Count Duroure, an alien, by whom she had a son, born abroad. The question was, whether this son was capable of inheriting lands in England, as heir to his mother. (*b*)

Lord Kenyon said, that supposing there existed any doubts respecting the meaning of the statute 25 Edw. III., yet the subsequent statutes operated as a parliamentary exposition of it; particularly the stat. 4 Geo. II. c. 21, which had closed the question, by enacting that all children born out of the ligeance of the Crown, whose *fathers* were natural-born subjects, should be natural-born subjects. And also the statute 13 Geo. II. c. 21, which extended the same privilege to grandchildren; but still confined them to the paternal line; from which it clearly followed, that a person born in foreign parts, and of a foreign father, did not derive inheritable blood, in this kingdom, from his mother. (*c*)

17. If an alien has two sons born in England, the one may inherit from the other, though none of them can inherit to their father; for the descent between them is immediate; and one shall make his title in a writ of *mort d'ancestor*, as heir to his brother, without mention of the father. (*d*)

(*a*) Bacon *v.* Bacon, Cro. Car. 601. (*b*) Doe *v.* Jones, 4 Term R. 300.
(*c*) 1 Vent. 422.
(*d*) Collingwood *v.* Pace, 1 Vent. 413. O. Bridg. 410. (2 Kent, Comm. 54, 55.)

18. * Formerly, where an alien was *medius antecessor*, *322 no title could be derived through him; but still an alien does not impede the descent. Thus, if an eldest son were an alien, the law took no notice of him; and the lands would descend to the younger brother. So if a person purchased land, and died, leaving no relation on the part of his father, but an alien, it would descend to the heir on the part of the mother. (*a*)

19. An *alien* may be *naturalized* by act of parliament, by which he becomes as *capable of inheriting* real property as if he were a natural-born subject.[1] And if an alien be made a *denizen*

(*a*) 1 Vent. 416, 417, 426.

[1] "The Act of Congress of the 14th of April, 1802, establishing a uniform rule of naturalization, affects the issue of two classes of persons. 1. By the 4th section, it was declared, that 'the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized, or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States.' This provision appears to apply only to the children of persons naturalized, or specially admitted to citizenship; and there is color for the construction, that it may have been intended to be prospective, and to apply as well to the case of persons *thereafter* to be naturalized, as to those who had previously been naturalized.* It applies to all the children of "persons duly naturalized," under the restriction of residence and minority, at the time of the naturalization of the parent. The act applies to the children *of persons* duly naturalized, but does not explicitly state whether it was intended to apply only to the case where both parents were duly naturalized, or whether it would be sufficient for one of them only to be naturalized, in order to confer, as of course, the rights of citizens upon the resident children, being under age. Perhaps it would be sufficient for the father only to be naturalized; for in the supplementary act of the 26th of March, 1804, it was declared, that if any alien, who should have complied with the preliminary steps made requisite by the act of 1802, dies before he is actually naturalized, his *widow* and *children* shall be considered as citizens. This provision shows that the naturalization of the *father* was to have the efficient force of conferring the right on his children; and it is worthy of notice, that this last act speaks of *children* at large, without any allusion to residence or minority; and yet, as the two acts are intimately connected, and make but one system, the last act is to be construed with reference to the prior one, according to the doctrine of the case *Ex parte Overington*.† 2. By a subsequent part of the same 4th section, it is declared, that the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States; provided

* The provision has been since adjudged to be prospective. West *v.* West, 8 *Paige's Rep.* 433. It was also adjudged, in Peck *v.* Young, 26 *Wendell's Rep.* 613, that an infant child of a person who became a citizen of the United States, in 1776, and always remained such *was a citizen*, though born abroad, and continued abroad, and an infant until after the peace of 1783, and married abroad after 1783, and under coverture until 1825; and though he never came to this country until 1830.

† 5 *Binney's Rep.* 371.

by the King's letters-patent, and afterwards purchases lands, his son, born before his denization, cannot inherit those lands; but a *son born after the denization may inherit* them, even though his elder brother were living. For the father before denization had no inheritable blood to communicate to his eldest son: but by denization it acquired an hereditable quality, which was transmitted to his subsequent posterity. If he had been *naturalized, such eldest son might then have inherited;* for that cancels all defects, and is allowed to have a retrospective energy, which simple denization has not. (*a*)

(*a*) 1 Inst. 8 a, 129 a.

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that the right of citizenship shall not descend to persons whose fathers have never resided within the United States. This clause is certainly not prospective in its operation, whatever may be the just construction of the one preceding it. It applied only to the children of persons who *then were* or *had been* citizens; and consequently the benefit of this provision narrows rapidly by the lapse of time, and the period will soon arrive, when there will be no statutory regulation for the benefit of children born abroad, of American parents, and they will be obliged to resort for aid to the dormant and doubtful principles of the English common law. The proviso annexed to this last provision, seems to remove the doubt arising from the generality of the preceding sentence, and which was, whether the act intended by the words, 'children of persons,' both the father and mother, in imitation of the statute of 25 Edw. III., or the father only, according to the more liberal declaration of the statute of 4 Geo. II. The provision also differs from the preceding one, in being without any restriction as to the age or residence of the child; and it appears to have been intended for the case of the children of natural-born citizens, or of citizens who were original actors in our revolution, and therefore it was more comprehensive and more liberal in their favor. But the whole statute provision is remarkably loose and vague in its terms, and it is lamentably defective in being confined to the case of children of parents who were citizens in 1802, or had been so previously. The former act of 29th January, 1795, was not so; for it declared generally, that 'the children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States.' And when we consider the universal propensity to travel, the liberal intercourse between nations, the extent of commercial enterprise, and the genius and spirit of our municipal institutions, it is quite surprising that the rights of the children of American citizens, born abroad, should, by the existing act of 1802, be left so precarious, and so far inferior in the security which has been given, under like circumstances, by the English statutes." 2 Kent, Comm. 51–53.

[The Act of Congress of Feb. 10, 1855, (Acts 1855, ch. 71; Little, Brown & Co.'s Ed. of Laws, p. 604,) provides "that persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were, or shall be at the time of their birth citizens of the United States, shall be deemed and considered, and are hereby declared to be citizens of the United States; *Provided,* the rights of citizenship shall not descend to persons whose fathers never resided in the United States." And, "any woman who might lawfully be naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen."]

20. By the statute 11 & 12 Will. III. c. 6, it is enacted, that all persons, being *natural-born subjects*, may inherit and make their title by descent from any of their ancestors, lineal or collateral, although their father or mother, or their ancestor, through whom they derive their pedigree, were born out of the King's allegiance.[1] But by a subsequent statute, 25 Geo. II. c. 39, it is provided, that no right of inheritance shall accrue, by virtue of the former statute, to any person whatsoever, unless they are in being, and capable to take as heirs, at the death of the person last seised: with an exception to the case where lands shall descend to the daughter of an alien; which descent shall be devested in favor of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters; according to the usual rule of descent. (*a*)

21. Persons *attainted of high treason*, and [previously to the statute of 54 Geo. III. c. 145, of any species] of *felony*, were incapable of inheriting lands, or of transmitting them by descent to their children. Thus Lord Coke says, "If a man be attainted of treason or felony, he can be heir to no man, nor any man heir to him, *propter delictum*. And this disability can only be removed * by act of parliament. But a person may inherit *323 from one of his parents, though the other was attainted of treason or felony; for *dupilcatus sanguis* is not necessary in descents. (*b*) [2]

(*a*) Infra, c. 3. (*b*) 1 Inst. 8 a, 391 b.

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[1] This statute was adopted in *Massachusetts* prior to the revolution, and the rule is still in force there, and of course in *Maine*, as part of the common law. See Palmer *v.* Downer, 2 Mass. 179, note. It is also in force in *Maryland*. But it does not operate to enable a person to deduce title through an alien ancestor who is still living. See McCreery *v.* Somerville, 9 Wheat. 354; where both this statute, and that of 25 Geo. 2, c. 39, are expounded by Mr. Justice Story. *Ante*, § 12, note. 2 Kent, Comm. 55, 56.

[2] The penal consequences of treason against the United States, so far as inheritance is concerned, are abolished by the statute of the United States of April 20, 1790, ch. 9. A similar provision has been made in several of the States; but in some others, the rule of the common law may be supposed to remain in force, in regard to treason committed against the particular State alone. See 2 Kent, Comm. 386. *Ante*, tit. 1, § 67, note. Post, tit. 30, § 11, note.

CHAP. III.

RULES OR CANONS OF DESCENT.[1]

SECT. 1. I. *Canon. Inheritances lineally descend.*
2. *Rule that* Nemo est Hæres viventis.
3. *The Ancestor must die seised.*
7. *Exceptions to this Rule.*
10. *Explanation of the first Canon.*
11. *A Descent may be defeated by the Birth of a nearer Heir.*
15. *Exclusion of the ascending Line.*
16. II. *Canon. Males preferred to Females.*
17. III. *Canon. The eldest Male succeeds.*
20. *But Females equally.*
21. IV. *Canon. Right of Representation.*
SECT. 25. V. *Canon. Collateral Descents.*
26. *The Heir must be of the Blood of the first Purchaser.*
31. *Descents* ex parte paternâ et maternâ.
32. *What Acts will alter the Descent.*
41. *What Acts will not have that Effect.*
45. VI. *Canon. Proximity.*
46. *Exclusion of the Half-Blood.*
49. *What Seisin necessary.*
60. *Trust Estates are within this Rule.*
61. VII. *Canon. The Male Stocks preferred.*
63. *Mode of tracing an Heir at Law.*

SECTION 1. The *first rule* or canon of descent, as laid down by Sir W. Blackstone, is,—"That inheritances shall *lineally*

[1] Each of the United States has its own rules of descent, many of which are peculiar to itself, though others are common to all. These rules are so various that it is extremely difficult to classify them, with any advantage to the student; and therefore they are separately stated in a note at the end of this chapter. The most successful attempt at methodical arrangement of them, will be found in Chancellor Kent's admirable Commentaries, Vol. IV. Lect. 65. But as the rules of the common law are referred to in the statutes of descents in some of the States, as rules of ultimate resort, it is deemed useful to retain this chapter nearly entire.

descend to the issue of the person who last *died actually seised*,[1] *in infinitum:* but shall *never lineally ascend.*" † [2]

* To explain this and the subsequent canons of descent, *328

[1] The actual seisin of the ancestor at the time of his death, seems to be required by the statutes of *Maryland*, *Mississippi*, and *Alabama*, which only provide for the descent of estates of persons who "die seised." See Chirac *v.* Reinecker, 2 Pet. 625.

The statutes of *Rhode Island*, *Connecticut*, *New Jersey*, *Pennsylvania*, *North Carolina*, and *South Carolina*, regulate the descent of the *real estate* of the intestate; without farther specification; and whether his actual seisin at the time of his death, is required in practice, in the administration of those statutes, the writer is not informed. [Actual seisin is not necessary to enable one having a present title to an estate, to become the stock or root of an inheritance. Hicks *v.* Pegues, 4 Rich. Eq. 413.] In all the other States, whose statutes are cited in these notes, the language of the statutes of descents and distributions is broad and general, embracing every right, title, and interest, which the intestate had at the time of his death, in the estates described in the respective statutes. In those of *Georgia*, *Illinois*, and *Louisiana*, the universal property, real and personal, of the intestate, seems to be embraced. The statutes of *Virginia*, *Kentucky*, *Mississippi*, *North Carolina*, *Ohio*, *Alabama*, *Florida* and *Missouri*, speak in general terms of *estates of inheritance*. Those of *Delaware*, and *Tennessee* are restricted to estates in *fee simple*; that of *Maryland* to estates in *fee simple*, *fee simple conditional*, and *fee tail*; and those of *Maine* and *Massachusetts*, to estates in *fee simple*, or for the *life of another*. The statute of *New York*, *excepts* estates for years, and estates for the life of another; and that of *Indiana excepts* all estates for life and estates for years. [In *Georgia* the rule is *titulus facit stipitem*, and not the common law rule, *seisina facit stipitem*. Thompson *v.* Sandford, 13 Geo. 238. In *New York*, one who has a vested remainder in fee simple, expectant on the determination of a present freehold estate, has such a seisin law, where the estate was acquired by purchase, as will constitute him a stock of descent. Wendell *v.* Crandall, 1 Comst. 491.]

In all these States, therefore, except the first three above mentioned, the rule that *sesina facit stipitem* may be regarded as virtually abrogated. See 4 Kent, Comm. 388. 1 Lomax, Dig. 594. Hillhouse *v.* Chester, 3 Day, 166. Bush *v.* Bradley, 4 Day, 306. per Reeve, J. Reeve on Descents, p. 376–379.

[2] The lineal ancestors are admitted to inherit in all the United States; though the order in which they succeed to the inheritance is not everywhere the same. See note at the end of this chapter.

† [This canon applies now only to descents which have taken place on the death of any person who died before the first day of January, 1834; for by the stat. 3 & 4 Will. 4, c. 106, in all cases of descents occurring upon the death of persons dying after that day, lineal ancestors are capable of inheriting, and they come in next after the lineal descendants of the last proprietor; thus if A dies seised intestate and without issue, leaving a father, brothers, and sisters, the father will take next as heir to his deceased son, before the brothers and sisters of the deceased. The words of section 6 of the act are, "that every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue.]

it will be necessary to premise some rules and principles, of the common law, which are applicable to this subject.

2. It is a rule of the common law that no inheritance can vest, nor can any person be the actual complete heir of another till the *ancestor is previously dead; nemo est hæres viventis.* Before that time, the person who is next in the line of succession is called an heir apparent, or an heir presumptive. *Heirs apparent* are such, whose right of inheritance is indefeasible, provided they outlive their ancestor; as the eldest son, or his issue; who must, by the course of the common law, be heir to the father, whenever he happens to die. *Heirs presumptive* are those who, if the ancestor should die immediately, would, in the present circumstances of things, be his heirs; but whose rights of inheritance may be defeated by the contingency of some nearer heir being born. (*a*)

3. Another rule of the common law respecting descents is, that no person can properly be such an ancestor, as that an inheritance can be derived from him, unless he had an *actual seisin.* Or, as Lord Coke expresses it,—"A man that claimeth as heir in fee simple to any man by descent, must make himself *heir to him that was last seised* of the actual freehold and inheritance."[1] And Lord Hale says,—"The last actual seisin in any ancestor makes him, as it were, the root of the descent, equally, to many intents, as if he had been a purchaser; and therefore he that cannot, according to the rules of descents, derive his succession from him that was last actually seised, though he might have derived it from some precedent ancestor, shall not inherit. (*b*) †

4. The law requires this notoriety of possession, says
329* Sir W. *Blackstone, as evidence that the ancestor had the property in himself, which is to be transmitted to his

(*a*) (Anon. Lofft. 278.) (*b*) 1 Inst. 11 b. Hal. Hist. Com. L. c. 11, p. 267.

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[1] This rule is abrogated in nearly all of the United States. See *ante*, § 1, note (2.)

† [In cases of descents occurring upon the deaths of persons dying after the 1st day of January, 1834, this rule is abolished; for by the late statute on Descents, ss. 1, 2, actual seisin is not necessary, but the descent is to be traced to the person last entitled to the land, that is to the person who last had a right to the land, whether he did or not obtain actual possession, or the receipt of the rents and profits thereof. See, also, 3 & 4 Will. 4, c. 27, s 14.]

heir. The seisin, therefore, of any person makes him the root or stock from which all future inheritance, by right of blood, must be derived; which is briefly expressed in the maxim of Fleta, *seisina facit stipitem.* (*a*)

5. The nature of seisin, and the difference between seisin in deed and seisin in law, has been explained in a former title. It is therefore sufficient here to observe, that when a person acquires an estate in fee simple in land by descent, it is necessary by the common law that he should enter on the lands to gain a seisin in deed, in order to transmit it to his heir; for if he had a seisin in law only, it will not be sufficient. (*b*) [1]

6. The rule of the common law is the same with respect to *incorporeal hereditaments.* So that where a rent so descends to a person, he must actually receive the rent before he can become the stock of a descent. (*c*)

7. There are, however, *several exceptions* to this rule; as where an ancestor acquires an estate by his own act, he is in many cases allowed to transmit it to his heirs, though he never had actual seisin of it himself. Thus, it is laid down *arguendo*, in Shelley's case, that if a fine was levied to A in fee, and afterwards, but before execution, A died, his heir might enter; and though he were the first that entered, yet he should be in by descent; it being a rule, that where the heir takes any thing which might have vested in the ancestor, the heir should be in by descent. It was however observed, that in a case of this kind the heir would not have been in directly by descent, either to be in ward, or to have had his age, or to have tolled the entry of one who had right. (*d*)

8. In the case of an *exchange*, if both parties die before either enters, the exchange is totally void; but if one of the parties enters, and the other dies before entry, his heir may enter, and shall be in by descent. (*e*)

9. *Trust estates* or *equitable interests* in lands or tenements may be transmitted to the heir, by an ancestor who never had

(*a*) 2 Bl. Comm. 209.
(*b*) Tit. 1. Lit. s. 8. 1 Inst. 11 b, 15 a. Altered by Stat. 3 & 4 Will. 4, c. 106.
(*c*) 1 Inst. 15 b. (*d*) 1 Rep. 98 a. (*e*) 1 Rep. 98 b. Tit. 32, c. 6.

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[1] In the United States, no entry by the heir is necessary, where the ancestor died seised. See *ante*, tit. 1, § 23, note (2); and § 31, note (1.) Tit. 29, ch. 1, § 4, note (1.)

obtained any kind of seisin or possession whatever. Thus,
330* where a person *contracts for the purchase of a real estate, and dies before it is conveyed to him, his equitable interest will descend to his heir, if not disposed of by will. (*a*) †

10. We now return to the *first canon* of descent, in consequence of which, whenever a person dies seised in fee simple of a real estate, leaving issue, it immediately descends to such issue, on whom the freehold in law is cast before entry.

11. It has been stated to be a rule of law, that the freehold shall never, if possible, be in abeyance. It is therefore settled, that lands shall always descend to the person who is heir at the time of the death of the ancestor: but such descent may be *defeated by the subsequent birth of a nearer heir.* Thus where a person dies leaving his wife *ensient*, the common law, not considering the infant *in ventre matris* to be in existence, casts the freehold on the person who is then heir. But when the posthumous child is born, his guardian may enter upon such heir, and take the estate from him. (*b*)

12. It was formerly doubted whether in a case of this kind the posthumous child was entitled to the profits from the death of his ancestor, or only from the time of his birth. But in a modern case, Lord C. J. De Grey laid it down as clear law, upon the authority of a case in the Year Books, Trin. 9. Hen. VI. 25 *a*, that a posthumous child was not entitled to any profits received before his birth; because the entry of the heir was congeable, till the posthumous child was born. (*c*)

13. If a man has issue a son and a daughter, and the son purchases lands in fee, and dies without issue; the daughter shall inherit the land from him. But if afterwards the father has issue a son, this son shall enter into the land, as heir to his brother, and oust his sister. (*d*)

(*a*) Potter *v.* Potter, 1 Vez. 437.
(*b*) Tit. 1. 1 Inst. 11 b.
(*c*) Goodtitle *v.* Newman, 8 Wils. 516.
(*d*) 1 Inst. 11 b.

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† [Equitable estates were, before the recent alterations in the law of inheritance, and still continue subject to the same rules and canons of descents as legal estates. In the case above cited the person contracting is in every sense of the word the purchaser; and equity considering what is agreed to be done as done, deems the buyer the real owner of the land from the period of the contract, when he becomes equitably seised. 2 P. Wms. 713.]

14. So where a son purchased land, and died without issue, his uncle entered as his heir; two years after, the father had issue another son; and it was held that such other son might enter on his uncle. (*a*)

15. The last clause of the first canon of descent, by which *parents, and all lineal ancestors, were excluded *331 from succeeding to the inheritance of their offspring, is derived from the feudal law, in which, we have seen, it was a settled maxim that the ascending line should in no case inherit.[1]† This rule appears to have been fully established in England in the time of King Henry II.; for Glanville writes, *hæreditas nunquam autem naturaliter ascendit.* And it was probably derived immediately to us from the customs of Normandy. (*b*)

16. The *second canon* or rule of descent is,—"That the male *issue shall be admitted before the female."[2] Thus *332 sons are admitted before daughters; or, as Lord Hale expresses it,—"In descents the law prefers the worthiest of blood; therefore, the son inherits and excludes the daughter. The brother is preferred before the sister, the uncle before the aunt." But daughters succeed before collateral relations; and in all cases of descent, females are preferred to more remote males; our law steering a middle course between the absolute rejection of females, and the putting them on a footing with males. (*c*) ‡

(*a*) Bro. Ab. tit. Descent, pl. 58.
(*b*) Dissert. c. 1, s. 61. Glanv. lib. 7, c. 1. Wright's Ten. 160.
(*c*) Hal. Hist. Com. L. c. 11. 2 Bl. Comm. 214.

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[1] Abrogated in the United States. See *ante*, § 1, note (3.)

[2] This rule does not exist in the United States, except in *Tennessee*. See the note at the end of this chapter.

† [See the note on sect. 1, of this chapter.]

‡ [This second canon of descents is further confirmed and explained by the statutes 3 & 4 Will. 4, c. 106, s. 7. The following are the words of the act,—"That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed."]

17. The *third canon* or rule of descent is, "That where there are two or more males, in equal degree, the eldest only shall inherit, but the females all together." [1]

The doctrine of primogeniture is also of feudal origin; for though, upon the first introduction of hereditary feuds, they descended to all the sons, yet that course was changed by a constitution of the Emperor Frederic. This practice appears to have been first introduced into England by the Conqueror, but was only applied to honorary and military feuds, which could not be divided without great inconvenience. (*a*)

18. Thus, we learn from Glanville that, in the reign of Henry II., estates held by military service descended to the eldest son only; and estates held in socage were partible among all the sons. *Cum quis ergo hæreditatem habens, moriatur, si unicum filium hæredem habuerit indistinctè verum est quod filius ille patri suo succedit in totum. Si plures reliquerit filios, tunc distinguitur utrum ille fuerit miles, sive per feudum militare tenens, aut liber sokemannus; quia si miles fuerit, vel per militiam tenens, tunc secundum jus regni Angliæ, primogenitus filius patri succedit, in totum. Ita quod nullus fratrum suorum partem inde de jure petere potest. Si vero fuerit liber sokemannus, tunc quidem dividetur hæreditas inter omnes filios, quotquot sunt, per partes æquales.* (*b*)

333* *19. The right of primogeniture appears, however, to have been fully established in the reign of Henry III., in socage lands, as well as in those held by a military service. For Bracton, in stating the law of descents, says: *Si quis plures habet filios, jus proprietatis semper descendit ad primogenitum, eo quod ipse inventus est primo in rerum naturâ.* (*c*)

20. As to females, all being equally incapable of performing any military service, there could be no reason for preferring the eldest; and, therefore, Littleton states the law to be that, where

(*a*) Wright's Ten. 31. (*b*) Glanv. Lib. 7, c. 3.
(*c*) Bract. 64 b.

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[1] In the United States, all the children inherit equally, like parceners; the eldest being only entitled, in some States, and on certain conditions, to have the family mansion, or other property incapable of division without great injury, on paying to the others the appraised value of their respective shares. In *Tennessee*, however, the male children take before the females. See the note at the end of this chapter.

a man or woman seised of lands in fee, hath issue but daughters, they shall all equally inherit, and make but one heir; and are called parceners by descent. (*a*)

21. The *fourth canon* or rule of descent is: "That the *lineal descendants in infinitum* of any person deceased shall *represent their ancestor;* that is, shall stand in the same place as the person himself would have done, had he been living."[1] Hence it is

(*a*) Lit. s. 241. *Ante*, tit. 19.

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[1] This rule, which is recognized in most of the United States, is thus stated by Chancellor Kent: "The second rule of descent is, that if a person dying seised, or as owner of land, leaves lawful issue of different degrees of consanguinity, the inheritance shall descend to the children and grandchildren of the ancestor, if any be living, and to the issue of such children or grandchildren as shall be dead, and so on to the remotest degree, as tenants in common. But such grandchildren, and their descendants, shall inherit only such share as their parents respectively would have inherited if living.

"The rule applies to every case where the descendants of the intestate, entitled to share in the inheritance, shall be of unequal degrees of consanguinity to the intestate. Those who are in the nearest degree take the shares which would have descended to them, had the descendants in the same degree, who are dead, leaving issue, been living; and the issue of the descendants who are dead, respectively, take the share which their parents, if living, would have received. It may be illustrated by the following example: A dies seised of land, and leaves B, a son, living, and D and E, two grandsons, of C, a son who is dead. Here B, the son, and D and E, the two grandsons, stand in different degrees of consanguinity; and B will, therefore, under this second rule, be entitled to one half of the estate, and D and E to the other half, as tenants in common. Or, suppose A should leave not only B, a son, living, and D and E, two grandsons, by C, who is dead, but also F and G, two great grandsons, by H, a daughter of C, who is also dead. Here would be descendants, living in three different degrees of consanguinity, viz.: a son, two grandsons, and two great grandsons. The consequence would be that B, the son, would take one half of the estate; D and E, the grandsons, would take two thirds of the other half; and F and G, the great grandsons, would take the remaining third of one half, and all would possess as tenants in common. Had they all been in equal degree, that is, had all of them been either sons, grandsons, or great grandsons, they would, under the first rule, have inherited the estate in equal portions; which is termed inheriting *per capita*. So that, when heirs are all in equal degree, they inherit *per capita*, or equal portions, and when they are in different degrees, they inherit *per stirpes*, or such portion only as their immediate ancestor would have inherited if living. Inheritance *per stirpes* is admitted when *representation* becomes necessary to prevent the exclusion of persons in a remoter degree; as, for instance, when there is left a son, and children of a deceased son, and a brother, and children of a deceased brother. But, when they are in equal degree, as all, for instance, being grandsons, representation is not necessary, and would occasion an unequal distribution of the estate; and they, accordingly, inherit *per capita*." See 4 Kent, Comm. 390, 391.

To this rule, however, there are exceptions in the States of *Rhode Island*, *New Jersey*, *North Carolina*, *South Carolina*, *Tennessee*, *Illinois*, *Mississippi*, *Louisana*, *Alabama*, and *Arkansas*; in which States the children take the share of their parent, however remote from the intestate, though all stand in the same degree, and never take *per*

(says Lord Hale) that the son or grandchild, whether son or daughter, of the eldest son, succeeds before the younger son; and the son or grandchild of the eldest brother, before the youngest brother. And so through all the degrees of succession, by the right of representation, the right of proximity is trans-
334 * ferred from * the root to the branches, and gives them the same preference as the next and worthiest of blood. (*a*)

22. "This right, (continues Lord Hale,) transferred by representation, is infinite and unlimited, in the degree of those that descend from the represented. For the son, the grandson, and the great-grandson, and so *in infinitum*, enjoy the same privilege of representation as those from whom they derive their pedigree had, whether it be in descents lineal or transversal; therefore, the great-grandchild of the eldest brother, whether it be a son or a daughter, shall be preferred before the younger brother, because though the female be less worthy than the male, yet she stands in right of representation of the eldest brother, who was more worthy than the younger." (*b*)

23. "So, if a man have two daughters, and the eldest dies in the life of the father, leaving six daughters, and then the father dies, the youngest daughter shall have an equal share with the other six daughters, because they stand in representation and stead of their mother, who could have but a moiety." (*c*)

24. It follows from this rule, that the nearest relation is not always the heir at law, as the next cousin *jure representationis* is preferred to the next cousin *jure propinquitatis.* And the taking by representation is called succession *per stirpes*, according to the roots, since each branch inherits the same share that their root or *stirps*, whom they represent, would have taken. (*d*)

25. The *fifth canon* or rule of descent is — "That on failure of lineal descendants, or issue of the *person last seised*, the inheritance shall descend to his collateral relations, being of the

(*a*) Hal. Hist. Com. L. c. 11. (*b*) Idem. (*c*) Idem. (*d*) 1 Inst. 10 b.

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capita. In *Rhode Island* this rule of representation seems to be admitted in all cases, collateral as well as lineal. In *New Jersey*, *Tennessee*, *Alabama*, and *Louisiana*, it is extended only to lineals and the descendants of brothers and sisters; and in the *Carolinas*, *Illinois*, and *Arkansas*, it seems restricted to lineals only. See the note at the end of this chapter.

blood of the first purchaser, subject to the three preceding rules."[1] And Sir W. Blackstone says, "the great and general principle upon which the law of collateral inheritances depends, is, that upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law to have originally descended; according to the rule laid down in the Year Books, Fitzherbert, Brook, and Hale — 'That he who would have been heir to the father of the deceased, and of course to the mother, or any other real or supposed purchasing ancestor, shall also be *heir to the son.' A maxim that will hold universally; except in the case of a brother or sister of the half-blood."(*a*)† *335

26. It was a maxim of the old law that no person could inherit an estate unless he was descended from the first purchaser or acquirer of it. This rule is to be found in the *Grand Coustumier*, of Normandy, c. 25, from whence it was introduced here; and is plainly derived from the feudal law. For when feuds first became hereditary, no person could succeed to a *feudum novum*, but the lineal descendants of the first acquirer, who was called the *perquisitor*. So that, if a person died seised of a feud of his own acquiring, without leaving issue, it did not go to his brothers, but reverted to the donor. If it was *feudum antiquum*, that is, if it had descended to the proprietor from any of his an-

(*a*) See Hawkins *v.* Shewen, 1 Sim. & Stu. 257.

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[1] The *English* rule, as Chancellor Kent observes, requiring the claimant of the inheritance to be heir of the whole blood to the person last seised, and also to be of the blood of the first purchaser, and giving preference, in collateral inheritances, to the paternal before the maternal line, as far as relates to the first purchaser, is founded on the technical rule, that it is necessary that the heir should show himself to be descended from the first purchaser, or should afford the best presumptive evidence of the fact.

The rule of the *American* law of descents, he adds, does not go on the principle of searching out the first purchaser through the mists of past generations, unless the estate be shown to be ancestral; and then it stops at the last purchaser in that ancestral line. Its general object is to continue the estate in the family of the intestate; and in effecting this, to pay due regard to the successive branches of that family, and principally to the loud and paramount claim of proximity of blood to the intestate. 4 Kent, Comm. 405, 406.

† [The above canon relating to collateral descent, is now altered, (except in descents which have occurred on deaths before the first day of January, 1834.) For by stat. 3 & 4 Will. 4, c. 106, s. 6, the lineal ancestor is preferred to the collaterals claiming through him.]

cestors; then his brothers, and such other collateral relations as were descended from the person who first acquired it, might succeed.

27. When the feudal rigor was in part abated, a method was invented to let in the collateral relations of the first purchaser to the inheritance, by granting a *feudum novum*, to hold *ut feudum antiquum;* that is, with all the qualities annexed to a feud derived from his ancestors; and then the collateral relations were admitted to succeed, even *in infinitum;* because they might have been of the blood of the first imaginary purchaser. (*a*)

28. In imitation of this rule, it has long been established in England, that every acquisition of an estate in fee simple by purchase shall be considered as a *feudum antiquum*, or feud of indefinite antiquity; therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might possibly have been purchased, are capable of being called to the inheritance. (*b*)

29. But where an estate has really descended, in a course of inheritance, to the person last seised, the strict rule of the
336 * feudal * law is still observed; and none are admitted but the heirs of those through whom the inheritance has passed; for all others have demonstrably none of the blood of the first purchaser † in them.

(*a*) 2 Bl. Comm. 221. (*b*) Idem, 222.

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† [The import of the word purchaser has been much extended by the enactments of the recent statute, 3 & 4 Will. 4, c. 106, for amending the law of inheritance. In s. 1 it is declared, that the word purchaser in the act shall mean the person who last acquired the land otherwise than by descent, or than by an escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent. By s. 2 it is enacted, that in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case, and the nature of the title shall require, the person last entitled to the land (that is, the person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof) shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and, in like manner, the last person from whom the land shall be proved to have been inherited, shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same.

And by s. 3 it is enacted, that when any land shall have been devised by any testator who shall die after the 31st day of December, 1833, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the

30. Thus, Lord Hale says, if the son purchases land, and dies without issue, it shall descend to the heirs on the part of the father; and if he leaves none, then to the heirs on the part of the mother; because though the son has both the blood of the father and the mother in him, yet he is of the whole blood of the mother; and the consanguinity of the mother are *consanguinei cognati* of the son. On the other side, if the father had purchased land, and it had descended to the son, and the son had died without issue, and without any heir on the part of the father; it should never have descended in the line of the mother, but escheated. For though the *consanguinei* of the mother were the *consanguinei* of the son, yet they were not of consanguinity to the father, who was the purchaser. But if there had been none of the blood of the grandfather, yet it might have resorted to the line of the grandmother; because her *consanguinei* were as * well of the blood of the father, as the mother's * 337 consanguinity is of the blood of the son; consequently, also, if the grandfather had purchased lands, and they had descended to the father, and from him to the son, if the son had entered, and died without issue, his father's brothers, or sisters, or their descendants; or for want of them, his grandfather's brothers, or sisters, or their descendants; or for want of them, his great-grandfather's brothers, or sisters, or their descendants; or for want of them, any of the consanguinity of the great-grandfather, or brothers or sisters of the great-grandmother, or their descendants, might have inherited; for the consanguinity of the great-grandmother was the consanguinity of the father: but none of the line of the mother or grandmother, viz. the grandfather's wife, should have inherited; for that they were not of the blood of the first purchaser. And the same rule, *e converso*, holds in purchases in the line of the mother or grandmother; they shall always keep in the same line that the first purchaser settled them in. (*a*)

(*a*) Hale, Hist. Com. L. c. 11, 120.

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land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed after the said 31st day of December, 1833, to the person, or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto, as his former estate, or part thereof. And see sect. 4.]

31. [From the above rule it follows] that where lands descend to a person *on the part of the father*, none of his relations on the part of the mother can inherit them. And *vice versâ*, where lands descend to a person *from his mother*, no relation on the part of his father can take them by descent. It should, however, be observed that *inheritances of this kind cannot be created by any act of the parties;* for if a person gives lands to another, "to hold to him and his heirs, *on the part of his mother*," yet his heirs on the part of his father, shall inherit. For no person can create a new kind of inheritance, not allowed by the law; therefore, the words "on the part of mother" are void. (*a*)

32. Where a person was seised in fee simple by descent, *ex parte maternâ*, there were (at the common law) *many acts* which might be done by such a person that would operate so as to *make him a new purchaser* of the estate, by which means it would become a feud of indefinite antiquity; and descendible to his heirs general, whether of the paternal or maternal line. (*b*)

33. Thus Lord Coke says, if a person be seised of lands, as heir of the part of his mother, and makes a feoffment in fee, and takes back an estate to him and to his heirs, this is a new purchase; and if he dies without issue, the heirs of the part of the father shall inherit.

Mr. Hargrave has observed on this passage, that Lord
338 * Coke * must be understood to speak of two distinct conveyances in fee. The first passing the use, as well as the possession, to the feoffee, and so completely devesting the feoffor of all interest in the land; and the second regranting the estate to him. (*c*)

34. So if a person seised of lands *ex parte maternâ*, make a feoffment in fee of them, reserving a rent to himself and his heirs, this rent will go to his heirs *ex parte paternâ;* because the feoffment in fee was a total disposition of the estate, and the rent was acquired by purchase. (*d*)

35. Where an estate descended *ex parte maternâ* is devised to an heir at law, in such manner as to make him a purchaser of it, the descent will be to the heirs *ex parte paternâ.* (*e*) †

(*a*) 1 Inst. 12 a, 13 a. 2 Doug. R. 773. Goodtitle *v.* White, 2 N. R. 383. 15 East, 174.
(*b*) (Cook *v.* Hammond, 4 Mason, R. 485.)
(*c*) 1 Inst. 12 b.
(*d*) Ibid.
(*e*) Tit. 38, c. 8.

† [Any devise to the heir of the testator, dying after the 31st day of December,

36. The renewal of a lease for lives being considered as a new acquisition, the person renewing becomes a purchaser, and the descent is thereby altered.

37. Elizabeth Mason having purchased a lease for three lives, died, leaving Mary, her daughter and heir, an infant. Two of the lives being dead, the guardians of the infant, out of the profits of the estate, took a new lease to the infant and her heirs, for three new lives; and afterwards the infant died without issue. The question was, whether this lease should descend to the heirs of the infant *ex parte paternâ* or *maternâ*. It was contended that it should go to the heirs *ex parte maternâ*, being a renewal only of the old lease, and under the old trust. For if the infant heir had died without issue before the renewal, living the surviving *cestui que vie*, there had been no question of it; and so ought the new lease, being renewed out of the profits of the old lease. (*a*)

The Master of the Rolls held that the renewed lease was a new acquisition, which vested in the daughter as a purchaser; therefore it should first go to the heirs of the part of the father. * The Lord Keeper Harcourt coming into Court, * 339 said he was of the same opinion.

38. In a subsequent case, exactly similar, it was objected that the renewal was an act done by a guardian only, during the minority; and ought not to prejudice any who take by representation; it being merely voluntary, and not of necessity. But Lord Hardwicke answered, that if this had been wantonly done by the guardian, without any real benefit to the infant, it would have been proper to have come into a court of equity to be relieved against it. But here was a just and reasonable occasion for what the guardian had done; here one life being dead, surrendering the old and taking a new lease was the most beneficial purchase for the infant that could be; and therefore ought to have the same consequence as if done by the infant herself, at her full age; and go to her heirs *ex parte paternâ*. That the case of Mason *v.* Day was exactly in point. (*b*)

39. [An equitable] estate being descendible in the same man-

(*a*) Mason *v.* Day, Prec. in Cha. 319. (*b*) Pierson *v.* Shore, 1 Atk. 489.

1833, will make the devisee a purchaser under the stat. 3 & 4 Will. 4, c. 106, s. 3. *Vide supra*, p. 336, note.]

ner as a legal one, where the *equitable estate* descends from the mother it will go to the heirs *ex parte maternâ;* but where the legal estate descends *ex parte maternâ*, and the trust estate *ex parte paternâ*, or *vice versâ*, the trust estate will merge in the legal, and both will follow the line through which the legal estate descended. (*a*) [1]

40. Sergeant Selby agreed for the purchase of the estate in question, and paid for it, but died before any conveyance was made; having by his will devised all his real and personal estate to his wife, in trust to educate and maintain his son, until he should attain the age of twenty-one years; and afterwards in trust to convey all the rest of his real estate to his son and his heirs. After the testator's death, the estate was conveyed to Mrs. Selby, who died before the son attained twenty-one; but he afterwards attained that age, and died in possession of the estate. The lessor of the plaintiff was his heir at law on the part of his mother, and the defendants were his heirs at law on the part of his father's mother. (*b*)

Lord Mansfield said,—"Sergeant Selby, after his purchase, was owner of the equitable estate, and had a right to go into Chancery to compel a conveyance. After his death the vendor conveyed to the widow, which conveyance was absolutely in trust for the son. He outlived his mother, by whose death
340* the * trust estate was completely vested in him, and the legal estate descended to him from her. The question was, to whom the estate descended on the death of the son. If it descended from the mother, the lessor of the plaintiff took it as heir at law; but it was contended, that though he was heir, there was a trust for the paternal heirs; and it was said to be settled, that the Court would not suffer a trustee to recover in ejectment against a *cestui que trust.* A case so circumstanced as this in every particular probably never existed before, and perhaps never might again; but cases must often have happened in which the general question would arise, *viz.*, whether, when *cestui que trust*

(*a*) Tit. 12, c. 2, s. 8, 9.
(*b*) Goodright *v.* Wells, 2 Doug. 771. Langley *v.* Sneyd, 1 Sim. & Stu. 45.

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[1] It is enacted in *New York*, (Rev. St. Vol. II. p. 38, § 21, 3d ed.,) that if the *cestui que trust* do not devise the estate, it shall descend to his heirs, in the same manner as other estates descend.

takes in the legal estate, possesses under it, and dies, the legal and equitable estates should open on his death, and be severed for the different heirs. Consider, first, upon authority; and, secondly, upon principle. First, no case had ever existed where it had been so held; none where the heir at law of one denomination had, on the death of the ancestor, been considered as a trustee for the heir at law of another denomination, who would have taken the equitable estate if that and the legal estate had not united. Secondly, on principle, it seemed to him impossible; for the moment both met in the same person, there was an end to the trust; he had the legal interest and all the profits by his best title. A man could not be trustee for himself. Why should the estates open upon his death? What equity had one set of heirs, more than the other? He might dispose of the whole if he pleased: if he did not, there was no room for Chancery to interpose; and the rule of law must prevail. *Quâcunque viâ datâ*, therefore, the lessor was entitled. If the question was doubtful, then in the Court of King's Bench the legal right must prevail: if the weight of opinion and argument was, that the legal estate must draw the trust after it; the case was still stronger against the defendant." Judgment for the plaintiff.

41. *No conveyance*, however, of a *particular estate* will alter the mode of descent of the *reversion;* because it is not a total departure of the estate.[1] Therefore if a person seised *ex parte*

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[1] The doctrine on this point was much discussed in Cook *v.* Hammond, 4 Mason, R. 467; and was summarily stated by Story, J., as follows:—"Where the estate descended is a present estate in fee, no person can inherit it, who cannot, at the time of the descent cast, make himself heir of the person last in the actual seisin thereof; that is, as the old law states it, *seisina facit stipitem*. But of estates in expectancy, as reversions and remainders, there can be no actual seisin during the existence of the particular estate of freehold; and consequently there cannot be any mesne actual seisin, which, of itself, shall turn the descent, so as to make any mesne reversioner or remainder-man a new stock of descent, whereby his heir, who is not the heir of the person last actually seised of the estate, may inherit. The rule, therefore, as to reversions and remainders, expectant upon estates in freehold, is, that unless something is done to intercept the descent, they pass, when the particular estate falls in, to the person who can then make himself heir of the original donor, who was seised in fee and created the particular estate; or if it be an estate by purchase, the heir of him who was the first purchaser of such reversion or remainder. It is no matter in how many persons the reversion or remainder may, in the intermediate period, have vested by descent; they do not, of course, form a new stock of inheritance. The law looks only to the

maternâ makes a gift in tail, or lease for life, reserving rent, the heir on the part of the mother will have the reversion, and also the rent as incident thereto.

341 * 42. * Where, at the common law, a person seised *ex parte maternâ* made a feoffment in fee, and the use was expressly limited to the feoffor and his heirs, or if there was no declaration of uses, and the feoffment was not on such a consideration as to raise a use in the feoffee, so that the use resulted to the feoffor; in either case he was in of the ancient use, and not by purchase; therefore, the descent was not altered. (*a*)

43. A person seised of lands by descent *ex parte maternâ*, made a feoffment of them to uses; as to Black Acre, to the use of himself for life, remainder to his wife for life, remainder to the heirs of his body on his wife begotten, remainder to his own right heirs; and as to White Acre, to the use of himself for ninety-nine years, if he should so long live, remainder to his wife for life, remainder to his first and other sons in tail male, remainder to himself and his heirs. Adjudged, that upon the death of the husband without issue, the remainder descended to the heirs of the feoffor, *ex parte maternâ;* because the ancient fee remained in him. (*b*)

44. Where a fine was levied, or a common recovery suffered; if the use was not altered, the mode of descent was not changed; but there were some particular cases in which a fine, and also a recovery, did alter the descent. (*c*)†

(*a*) 1 Inst. 12 b. 1 Rep. 100, b. Tit. 11, c. 4.
(*b*) Godbold *v.* Freestone, 3 Lev. 406.
(*c*) Tit. 35 and 36.

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heir of the donor or first purchaser. But while the estate is thus in expectancy, the mesne heir, in whom the reversion or remainder vests, may do acts, which the law deems equivalent to an actual seisin, and which will change the course of the descent, and make a new stock. Thus, he may, by a grant, or devise of it, or charge upon it, appropriate it to himself, and change the course of the descent. In like manner, it may be taken in execution for the debt of such mesne remainder-man or reversioner during his life, and this, in the same manner, intercepts the descents. But if no such acts be done, and the reversion or remainder continues in a course of devolution by descent, the heir of the first donor or purchaser will be entitled to the whole as his inheritance, although he may be a stranger to all the mesne reversioners and remainder-men, through whom it has devolved." 4 Mason, R. 484, 485. And see Miller *v.* Miller, 10 Met. 393; Russell *v.* Hoar, 3 Met. 187.

[† But now, by the above-mentioned act, 3 & 4 W. 4, c. 106, s. 3, the law is altered, and if a person seised *ex parte maternâ* makes a feoffment or any other conveyance, and

45. The *sixth canon* or rule of descent is,—"That the *collateral heir* of the person last seised must be his *next* collateral kinsman, of the *whole blood.*[1]

First, (says Sir W. Blackstone) he must be his next collateral kinsman, either personally or *jure representationis;* which proximity is reckoned according to the canonical degrees of consanguinity. The issue or descendants, therefore, of the brother of John Stiles, (the *præpositus* in his table of descents, are all of them in the first degree of kindred with respect to *inheritances; those of his uncle in the second, and those *342 of his great uncle in the third; and so on as their respective ancestors, if living, would have been, and are severally called to the succession in right of such their representative proximity. And here it must be observed, that the lineal ancestors, though, according to the first rule, incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. (*a*)

46. Secondly, the heir need not be the nearest kinsman absolutely, but only *sub modo;* that is, he must be the nearest kinsman of the whole blood; for if there is a much nearer kinsman of the *half-blood*, a distant kinsman of the whole blood shall be admitted, and the other *entirely excluded.* (*b*) [2]

47. By the ancient customs of Normandy, the *frater uterinus* could not inherit from his brother, when the inheritance descended

(*a*) 2 Bl. Comm. 224. *Ante*, c. 2.
(*b*) (2 Bl. Comm. 228–231. Hawkins *v.* Shewen, 1 Sim. & Stu. 260.)

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the use is limited to himself and his heirs, he will take by purchase, and the descent will be changed. But where, as in the case before supposed the use results, it is conceived that the statute does not affect it, but it results as the ancient use.]

[1] See *ante*, § 25, note.

[2] The rule of exclusion of the half-blood, is said by Sir Wm. Blackstone to be not so much a rule of descent, as a rule of evidence, auxiliary to the great and universal principle of the law of inheritances, that estates should descend to the blood of the first purchaser; the presumption being that the heir of the whole blood of the person last seised is most likely to be of the blood of the unknown ancestor who first acquired the estate. 2 Bl. Comm. 228; *Ante*, § 25; Wright, Ten. 186. But this rule is now almost entirely abrogated in England, by stat. 3 & 4 Will. 4, c. 106, § 9; see *post*, § 48, note. In many of the United States, the distinction between the whole and half-blood is entirely unknown; and in all the others it is very much reduced and modified. See 4 Kent, Comm, 403–406, and the cases there cited. See also the *note* at the end of this chapter.

from the father; and *vice versâ:* from which the origin of the custom of excluding the half-blood probably arose. For Bracton states it as doubtful whether the half-blood, on the father's side, was excluded from an inheritance which originally descended from the common father; or only from such as descended from the respective mothers; and from newly-purchased lands. It appears however from Britton, c. 119, that when he wrote, the half-blood was excluded from inheriting in all cases. In 5 Edw. II., a case arose, in which it was determined, that where a person died seised of lands, leaving a sister of the half-blood, and an uncle of the whole blood, the uncle should inherit, and not the sister. And in 10 Edw. III. it was held, that where a man had three daughters by one venter, and one daughter by another venter, and died seised of lands, and all of them entered; afterwards two of the daughters by the first venter died, that the third daughter of the first venter should be heir to them, and should have their two parts; and the fourth daughter should take nothing from them; because she was of the half-blood. (*a*)

48. In conformity to these cases, it is laid down by Littleton, s. 6 and 7, that if a man has two sons by divers venters, and the elder purchases land in fee simple, and dies without issue, the younger brother shall not have the land, but the uncle of 343* *the elder brother, or some other his next cousin shall have the same; because the younger brother is but of the half-blood. So, if a man has a son and a daughter by one venter, and a son by another venter, and the son by the first venter dies without issue, his sister shall be his heir.†

(*a*) Grand Coust. c. 25. Bract. fo. 65 a. Mayn. 148. 10 Assise, pl. 27. Bro. Ab. tit. Descent, 20.

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† [The preceding canon of descent is now only applicable to descents occurring upon deaths previous to the 1st day of January, 1834; for by the stat. 3 & 4 Will. 4, c. 106, s. 9, it is provided that any person related to the person from whom the descent is to be traced by the half-blood, shall be capable of being his heir; and the place in which any such relation by the half-blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood and his issue where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half-blood on the part of the father, shall inherit next after the sisters of the whole blood, on the part of the father and their issue, and the brother of the half-blood on the part of the mother, shall inherit next after the mother.

The reason for the variation of the above enactment in the descent of the half-blood

49. * We have seen that [by the common law] no person could be such an ancestor as that an inheritance might be derived from him, unless he had actual seisin; therefore there must have been an *actual seisin in deed* to exclude the half-blood.[1] Thus Littleton says,—" When a man is seised of lands in fee simple, and hath issue a son and a daughter by one venter, and a son by another venter, and dies, and the eldest son enters, and dies without issue; the daughter shall have the land, and not the youngest son, yet the younger son is heir to the father, but not to the brother: but if the elder brother doth not enter into the land after the death of his father, but dies before any entry made by him, then the younger brother may enter, and shall have the land as heir to his father: but when the elder son, in the case aforesaid, enters after the death of his father, and hath possession, there the sister shall have the land; because it is a maxim of law, that *possessio fratris, de feodo simplici, facit sororem esse hæredem.*" (*a*) *344

50. In consequence of this principle, it was necessary to ascertain whether the heir acquired such a seisin, upon the death of his ancestor, as was required by law, to make him the stock of the inheritance; for if he had not, then the ancestor was the person who was last seised of the inheritance, to whom the claimants must make themselves heirs. (*b*)

51. It has been stated that an entry or claim was, in most cases, necessary to acquire a seisin in deed; and that, where the lands lay in different counties, there must be an entry in each county. Thus, where the demesnes of a manor extended into two counties, the eldest son, upon the death of his father, entered into the demesnes in one county only, and died without issue. It was said, by Manwood, that his sister of the whole blood should inherit the demesnes whereon her brother had entered; and his brother of the half-blood the rest. (*c*)

(*a*) *Ante*, s. 8. Lit. s. 8. (*b*) Ratcliff's case, 8 Rep. 37.
(*c*) Tit. 1, § 23. 1 Leon. 265.

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on the maternal side is, that in tracing the descent to a brother of the half-blood on the part of the father, the brothers and sisters of the whole blood have been previously let in to the inheritance.]

[1] The statutes of descent, in the United States, have nearly abolished the necessity of an actual seisin in the ancestor. See 4 Kent, Comm. 388, 389; *Ante*, tit. 1, § 31, note (1.) See also, *supra*, § 1, note (2.)

52. It has also been stated that the *possession of a termor* for years is the possession of the person entitled to the freehold. Hence, Lord Coke says, if a father makes a lease for years, and the lessee enters, and the eldest son, having succeeded his father, dies during the term, before entry or receipt of rent, the younger son of the half-blood shall not inherit, but the sister; be-
345* cause the *possession of the lessee for years is the possession of the elder son; so as he is actually seised of the fee simple; and, consequently, the sister of the whole blood is to be heir. (*a*)

53. A, seised in fee, had two daughters by several venters, and devised a moiety of the land to his wife for seven years; and that the elder sister should enter on the other moiety, on the day of her marriage. A died; his wife entered and educated the daughters; the eldest sister married, and entered with her husband into one moiety; the younger sister died without issue. Resolved, that the heir of the whole blood of the younger sister should have her moiety; for the *possession of the mother* for seven years was an actual possession in the younger sister. (*b*)

54. It has also been stated that the *possession and seisin of one tenant in common* was the possession and seisin of the other; and it was determined that such a possession would exclude the half-blood. (*c*)

55. A. had issue, B., a son, and M., a daughter, by one venter, and N. and O., daughters, by another venter, and devised all his lands to his wife, *durante viduitate.* The wife entered into all. B., the eldest son, died, without having entered. It was adjudged that the will was void for a third part, because the lands were held by knight service; that the entry of the wife into all made her seised but of two parts, and tenant in common with her son of a third part; and that the entry of the wife should vest such a possession in common, in the son, of the third part, as should make a *possessio fratris* in him, for his sister of the whole blood. (*d*)

56. The *possession of a guardian in socage* is the possession of the ward, who thereby acquires an actual seisin, without entry; and where a posthumous son was born, his mother being in possession of the lands whereof his father died seised, she became

(*a*) Tit. 1, § 27. 1 Inst. 15, a. 3 Rep. 41, b. (*b*) Jenk. Cent. 6. Ca. 25.
(*c*) Tit. 20, § 14. (*d*) Small *v.* Dale, Moo. 868. Hob. 120.

his guardian in socage; and the infant son was thereby deemed to be actually seised of the inheritance; so as to exclude the half-blood. (*a*)

57. A. Newman being seised in fee of four messuages, and having issue four daughters, died, leaving his second wife *ensient* with a son, who was born six weeks after the death of his father, and lived five weeks, and then died; his mother continuing all that time in possession of the houses, residing in one of them with the two daughters, and receiving rent for the others. (*b*)

* The question was, whether this was such a seisin as *346 would exclude the daughters from inheriting. It was argued for the plaintiff, the heir at law of the son of the whole blood, that the son died last actually seised in fee of the premises; that, upon the death of the father, the premises descended to his two daughters, who, together with the mother, being *ensient* with a son, were then in rightful possession; that, upon the birth of the son, six weeks after, the estate of the daughters was devested out of them, and the mother then became and was guardian in socage to her son; that her possession, and receiving the rents and profits, was the actual possession and seisin of the son, and would carry the descent of the premises to the heir at law of the son. The infant son was in possession as much as it was possible for an infant to be; for he was born, lived, and died in one of the houses; which gave a title to the heir of the whole blood: for the law would presume that the mother entered rightfully, as guardian to her infant son, and not wrongfully.

On the other side, it was contended for the defendants, that the rule of *possessio fratris* was extremely severe, and ought not to be extended, but should be construed as favorably as possible for the daughters; that to make a *possessio fratris* there ought to be an actual seisin; that it was not found or stated in the case, that the mother entered as guardian in socage, but that she and the two daughters continued in possession from the time of the husband's death; that six weeks after the husband's death the son was born, and died in the same house; that this was a continuance of the old estate in herself and the daughters, or in

(*a*) 1 Inst. 15 a. Whitcombe *v.* Whitcombe, Prec. in Cha. 280. (Tit. 1, § 25.)
(*b*) Goodtitle *v.* Newman, 3 Wils. 516.

the daughters only, for the law would adjudge the possession in those who had a lawful right to the possession, namely, the daughters; and the Court could not determine, upon the facts stated in the case, whether the mother was in possession as guardian to the son, or as a trespasser, or for her quarantine, in order to have dower.

The Court were all of opinion that the premises in question belonged to the lessor of the plaintiff, and therefore gave judgment for the plaintiff.

349 * *58. An entry by *a mother, as guardian in socage*, gave a sufficient seisin to an infant, to exclude the heir of the half-blood.

59. A man died leaving two daughters by different venters; the mother entered as guardian in socage, and received the profits. The question was, whether this gave such a seisin to the daughters, that on the death of one of them, the other could not inherit from her. It was contended, 1. That the entry of the mother as guardian in socage, and her receipt of the profits, amounted to a sufficient seisin for her daughter; that this point was sufficiently established by the preceding case. 2. That the seisin of one coparcener was the seisin of the other, and the entry of one was in law the entry of the other. Where two claim by the same title, as two sons from their father, and the younger son enters, the law will presume that his entry was not to gain a possession distinct from his elder brother, but merely to preserve the estate from a stranger; therefore, though the younger son die seised, and his heir enters by descent, yet the entry of the elder brother, or his heir, is not therefore taken away. That if the law put so favorable a construction in that case, where the younger son cannot have any claim for himself, *a fortiori* such a presumption should be made in the case of coparceners, who make but one heir; and so it was stated in 1 Inst. 243 *b*, that where one coparcener enters generally and takes the profits, this shall be accounted in law the entry of both, and no devesting of the moiety of her sister. (*a*)

350 * *On the other side it was argued, that there was no seisin in fact by the elder sister, but at most a seisin in law; and the Court would not incline to extend the operation of

(*a*) Doe *v.* Keen, 7 Term R. 386. Tit. 19, s. 7. Lit. s. 396.

the rule, excluding the succession of the half-blood, beyond the strict letter of it.

Lord Kenyon said,—Nothing could be clearer than that an infant might consider whoever entered on his estate, as entering for his use. The Court held that the surviving sister did not take by descent; but the lands should go to the heir of the whole blood of the sister who died.

60. Before the Statute of Uses, it was held that there might be a *possessio fratris* of a use; therefore where a *cestui que use* had issue a son and a daughter by one venter, and a son by another venter, and died; the eldest soon took the profits, and died without issue; it was held that the use should descend to the daughter, as sister and heir to her brother, not to the younger son. And since the doctrine of trusts has been established by the Court of Chancery, the rule of *possessio fratris* was *applied to trust estates*, as fully as to legal ones. (*a*)

*61. The *seventh and last canon* or rule of descent is, *351 "That in collateral inheritances, the male stocks shall be preferred to the female; that is, kindred derived from the blood of the male ancestor, however remote, shall be admitted before those from the blood of the female, however near; unless where the lands have, in fact, descended from a female." [1]

62. Thus, the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all; and the relations of the father's father before those of the father's mother, and so on. Sir W. Blackstone observes that this rule was established in order to effectuate and carry into execution the fifth rule or principal canon of collateral inheritance, that every heir must be of the blood of the first purchaser. For when such first purchaser was not easily to be discovered, after a long course of descents, the lawyers not only endeavored to investigate him by taking the next relation of the whole blood to the person last in possession; but also considering that a preference had been given to males, by virtue of the second canon, through the whole course of lineal descent, from the first purchaser, they

(*a*) 1 Inst. 14 b. Dyer, 10 b.

[1] This rule has no application in the United States, unless possibly as a rule of final resort, in the cases alluded to in note (1,) at the beginning of this chapter.

judged it more likely that the lands should have descended to the last tenant, from his male, than from his female ancestors. The right of inheritance, therefore, first runs up all the father's side, with a preference to the male stocks in every instance; and if it finds no heirs there, it then, and then only, resorts to the mother's side; leaving no place untried, in order to find heirs that may by possibility be derived from the original purchaser. (*a*)

63. After a due consideration of the canons or rules of
352* descent *already laid down, it will not be a difficult matter to ascertain the party on whom the law casts the inheritance, whenever a comprehensive genealogy shall be made out, of the persons connected in blood with the *præpositus*, or party last seised; for there is no title in the English law reducible to a more technical system than the title of descent in fee simple. One or the other of two principles only will determine every case of competition on the subject of inheritance at common law. These principles are, 1st, dignity of blood, and 2d, proximity of blood.

64. Lord Coke, in his Commentary on Littleton, has partly explained in what order the attribute of dignity of blood is applied by legal intendment. But as the whole subject is susceptible of a compendious arrangement, perhaps it may be satisfactory to enumerate the several classes which by physical necessity must comprehend every description of kindred, and to state the degree of dignity in which they stand to the *præpositus*. (*b*)

65. These classes are,—1. The male stock of the paternal line. 2. The female stock of the paternal line. 3. The male branches of the female stock of the paternal line. 4. The female branches of the female stock of the paternal line. 5. The male stock of the maternal line. 6. The female branches of the male stock of the maternal line. 7. The male branches of the female stock of the maternal line. 8. The female branches of the female stock of the maternal line.

(*a*) 2 Bl. Comm. 235. See also statute 3 & 4 Will. 4, c. 106, ss. 7, 8, and sup. s. 16, note.

(*b*) 1 Inst. 10 a, 12 a.

NOTE.—The remaining sections of this chapter are omitted, being occupied with discussions on points seldom if ever likely to arise in the United States; and including the able essay of the late Chief Justice Osgood, of Lower Canada, in refutation of

the position of Mr. Justice Blackstone, that the heir of the *besailes*, or great-grandmother, on the part of the father, ought to be preferred to the heirs of the *ailes*, or grandmother on the same side. The point is here alluded to, merely, to refer the student to the source at which he may gratify his curiosity on this subject.

By the laws of the several United States, inheritances descend in the following order:—

MAINE. Rev. St. 1840, ch. 93.

1. To the *children* of the intestate, and the lawful issue of any deceased child, by right of representation. And if there be no child living at his decease, then to all his lineal descendants; *per capita*, if they are in equal degree; otherwise, *per stirpes*.

2. If there be no issue, then to his *father*.

3. If neither issue nor father, then to his *brothers* and *sisters*, and the children of any deceased brother or sister, by right of representation; his *mother*, if any, taking an equal share with his brothers and sisters.

4. If there be no issue, father, brother, nor sister, then to his *mother* alone, to the exclusion of his nephews and nieces.

5. If there be none of these, then to his *next of kin in equal degree;* those claiming through the nearest ancestor to be preferred to those claiming through one more remote.

6. If the intestate leave children, or one child and the issue of one or more others, and any such surviving child die under age, having never been married; his share of the estate of his father goes to the other children of the same parent, and to the issue of any deceased child by representation. Provided, that when the issue or next of kin of such deceased child are all in equal degree, they take *per capita*.

7. In default of kindred, it escheats to the State.

8. The half-blood inherit equally with the whole, in the same degree.

NEW HAMPSHIRE. Rev. Stat. 1842, ch. 166.

1. }
2. } The same as No. 1, 2, 3, in Maine.
3. }

4. To the *next of kin*, in equal shares.

5. If the intestate be a minor and unmarried, his estate, derived by descent or devise from his father or mother, goes to his brothers or sisters, or their representatives, excluding the other parent.

6. No representation is admitted among collaterals, beyond brother's and sister's children.

7. In default of heirs, it escheats to the State.

[A man having several children dies, leaving a widow, and one of his children dies under age and unmarried. The widow married again and had two children. Held, that the share of the deceased child in the father's estate would go to the surviving children of his father, to the exclusion of the brother and sister of the half-blood by the same mother, but by a different father. Crowell *v.* Clough, 3 Foster, (N. H.) 207. See also Prescott *v.* Carr, 9 Ib. 453.]

MASSACHUSETTS. Rev. St. 1836, ch. 61.

The law of descents in Massachusetts is the same as that of Maine, the latter being originally derived from the former.

But if there be no kindred, the widow, if any, takes the whole, as heir. If there be no widow, it escheats to the State. Stat. 1849, ch. 87.

[See Curtis *v.* Hewins, 11 Met. 294.]

RHODE ISLAND. Rev. St. 1844, p. 238.

1. To the *children* and their descendants.
2. To the *father*.
3. To the *mother, brothers, and sisters*, and their descendants.
4. If there be neither issue, nor parents, nor issue of parents, then, in equal moieties to the *paternal* and *maternal kindred*, each in the following course:—
   1. To the *grandfather*.
   2. To the *grandmother, uncles* and *aunts*, and their descendants.
   3. To the *great-grandfathers* or *great-grandfather*.
   4. To the *great-grandmothers*, and the *brothers and sisters of grandfathers and grandmothers* and their descendants:—and so on *ad infinitum*:—passing, first, to the nearest lineal *male* ancestors; and secondly, to the female, in the same degree, and their descendants.
5. No right of inheritance accrues to any person (except to children of the intestate) unless the person be in being, and capable in law to take as heir, at the time of the intestate's death.
6. When the estate descends in moieties, as above, to the paternal and maternal kindred, if there be no kindred on the one part, the whole goes to the kindred of the other part. If there be none of either part, the whole goes to the husband or wife, if living; but if dead, then to his or her kindred, as if the husband or wife had survived the intestate, and then died, entitled to the estate.
7. The descendants of any person deceased shall inherit the estate which such person would have inherited had he survived the intestate.
8. If the estate came from the parent or kindred of the intestate, by descent, gift, or devise, and the intestate die without children, it goes to his next of kin, of the blood of the person from whom the estate came, if any there be.

[Cozzens *v.* Joslin, 1 R. Isl. 122.]

CONNECTICUT. Rev. St. 1849, p. 357, 358.

1. To the *children* of the intestate, and their representatives.
2. To *brothers and sisters of the whole blood*, and their representatives.
3. To the *parents* of the intestate.
4. To *brothers and sisters of the half-blood*, and their representatives.
5. To the *next of kin* in equal degree; but preferring the whole blood. No representation is permitted among collaterals, after the representatives of brothers and sisters.
6. Ancestral estates, descending to collaterals, go
   1. To *brothers and sisters* of the same ancestral blood, and their representatives.
   2. To *children of the same ancestor*, and their representatives.
   3. To *brothers and sisters of the same ancestor*, and their representatives.
   4. To the *general heirs*, as if it were not an ancestral estate.

VERMONT. Rev. Stat. 1839, ch. 52.

1. To the *children* of the intestate, or their representatives.
2. If there be no issue, then half to the *widow*, and the other half to go as the whole would if there were no widow. If there be no kindred, the widow takes the whole.
3. If no issue nor widow, the *father* takes the whole.
4. If neither issue, widow, nor father, it goes to the *brothers* and *sisters*, equally, and

their representatives, and to the *mother*, she taking an equal share with the brothers and sisters.

5. If none of these, then it descends to the *next of kin*, excluding the representatives of deceased kindred.

6. The half-blood is admitted to an equal share with the whole blood.

7. If there be no kindred, the land *escheats* to the town in which it lies, for the use of the public schools.

NEW YORK. Rev. Stat. 3d ed. Vol. II. p. 35.

1. To the *lineal descendants* of the intestate.
2. To the *father*.
3. To the *mother*.
4. To his *collateral relatives*.

Subject, however, to the following rules: —

1. Lineal descendants, in equal degree, take *per capita*.
2. If any child is living, and others are dead leaving issue, the children of each deceased child take by representation.
3. The preceding rule applies to all descendants, in unequal degrees; the children in each degree taking the share of their parent, and the nearest in degree taking the share which would have fallen to them had all the descendants in the same degree been living.
4. If there be no descendants, but the father be living, he takes the whole; unless the estate came *ex parte maternâ*, and the mother be living. But if she be dead, then the estate goes to the father for life, and the reversion to the brothers and sisters of the intestate, if there be any living; but if none living, then to the father in fee.

5. If there be no descendants, and no father entitled to take as above, then to the mother for life, and the reversion to the brothers and sisters of the intestate and their descendants, *per stirpes*. But if there be none such, then to the mother in fee.

6. If there be no parent capable of inheriting the estates, then it descends, in the cases hereafter specified, to the collateral relatives; to share alike, *per capita*, if they are all in equal degree, however remote from the intestate.

7. Brothers and sisters of the intestate take *per capita* if all be living; but if some be dead, leaving issue, the issue take *per stirpes;* and the same rule applies to all the direct lineal descendants of brothers and sisters, to the remotest degree.

8. If there be no heir entitled to take under either of the preceding sections, and the inheritance be derived *ex parte paternâ*, it descends,

1. To the brothers and sisters of the father, in equal shares if all be living.
2. If some be living, and others dead, leaving issue, then *per stirpes*.
3. If all such brothers and sisters be dead, then to their descendants.

In all cases, the inheritance is to descend in the same manner, as if such brothers and sisters had been those of the intestate.

4. If there be no brothers nor sisters, nor their issue, of the father's side, then to the brothers and sisters of the mother, and their issue, in the same manner.

9. If the inheritance be derived *ex parte maternâ*, then it goes first to the brothers and sisters of the mother, and their issue, and then to those of the father; as in the preceding case, *vice versâ*.

10. If the inheritance be not ancestral, but acquired by the intestate, in its descent to collaterals it goes equally to those on both sides.

11. The half-blood inherits equally with the whole blood; unless the estate be de-

rived from an ancestor by descent, devise, or gift; in which case none inherit who are not of the blood of that ancestor.

12. In all cases not otherwise provided for, inheritances descend according to the course of the *common law.*

13. Real estates held in trust, if not devised by the *cestui que trust*, descend to his heirs, according to the preceding rules.

[The rule of the common law that, in the descent of a newly-purchased inheritance, the blood of the father is to be preferred, is not applicable where the descent is to brothers and sisters, or their descendants. Brown *v.* Burlingham, 5 Sandf. 418.]

NEW JERSEY. Rev. Stat. 1846, Tit. X. ch. 2, p. 337.

1. To the *children* of the intestate and their issue, by representation, *ad infinitum;* the children in all cases taking the share which the parent would have taken, if living.

2. To his *brothers and sisters* of the whole blood, and their issue, in the same manner.

3. To his *father.* But if it be a maternal inheritance, then it descends as if the father had previously died.

4. To his *mother*, for life only; the reversion to go as if the mother had previously died.

5. If neither parents, nor brother or sister of the whole blood, then to his *brothers and sisters of the half-blood*, and their issue, by representation. But if the estate were derived from an ancestor, then only to those of the blood of that ancestor, if any be living.

6. If there be none of these, then to the *next of kin* in equal degree; subject to the preceding restriction as to ancestral estates.

PENNSYLVANIA. Rev. Stat. 1846, ch. 403, p. 504, Dunlop's ed.

1. To *children*, and their descendants. If all in the same degree, then *per capita;* if in different degrees, then *per stirpes;* the issue in every case taking only what the parent would have taken, if living.

2. If no issue, then to the *father and mother* as joint-tenants for life; or to the survivor for life, if but one; the reversion to the *brothers and sisters* of the intestate of the *whole* blood, and their children, by representation.

3. If no such brothers and sisters, or their children, then to the *next of kin*, being descendants of brothers and sisters of the *whole* blood.

4. If no issue, nor brothers nor sisters of the whole blood, nor their issue, then to the *father and mother*, if living, or to the survivor of them.

5. If none of these, then to the *brothers and sisters* of the *half*-blood, and their issue, as before provided in the case of the whole blood.

6. In default of all these, then to the *next of kin.*

7. No representation among collaterals is permitted, after brothers' and sisters' children.

8. No person can inherit an estate, unless he is of the blood of the ancestor from whom the estate came.

9. In default of any heirs or kindred, as aforesaid, the estate goes to the surviving *husband* or *wife*, if any; but if none, then it *escheats* to the State. [Parr *v.* Bankhart, 22 Penn. (10 Harris,) 291; Hart's Appeal, 8 Barr. 32; Lewis *v.* Gorman, 5 Ib. 164.]

DELAWARE. Rev. Stat. 1829, p. 315, 316.

1. To the *children* of the intestate, and their issue.

2. If no issue, then to his *brothers and sisters of the whole blood*, and their issue.

3. If none of these, then to his *brothers and sisters of the half-blood*, and their issue.

4. In default of all these, then to his *father*.

5. If no father, then to his *mother*.

6. If neither issue, brothers, nor sisters, nor their issue, nor parent, then to his *next of kin* in equal degree.

7. Estates derived by descent or devise, if there be no issue, go the brothers and sisters, if any, and their issue, of the *blood of the ancestor* from whom the estate came. But if there be none such, then the estate goes as any other estate, by the preceding rules.

8. Collaterals claiming through the nearest ancestor are preferred to others.

MARYLAND. Stat. 1820, ch. 191. 1 Dorsey's ed. p. 745.

1. To *children* and their descendants.

2. If no issue, and the estate descended *ex parte paternâ*, then to the *father;* but if no father, then to the brothers and sisters of his blood, and their issue; and if none of these, then to the paternal grandfather, if living; but if not, then to his descendants in equal degree, equally; then to the grandfather's father, and his descendants, and so on, to the next lineal male paternal ancestor, and his issue *ad infinitum*. And if there be no paternal ancestor nor descendant of any, then to the mother, and the kindred on her side, in the same order.

3. If there be no issue, and the estate descended *ex parte materna*, then to the *mother*, and to the *brothers and sisters of her blood*, and their issue; and then to *her kindred*, in the same order as in the preceding case; and in default of maternal kindred, then to the *paternal kindred*, in the same order as before.

4. If the estate was acquired *by purchase*, and there be no issue, then it descends,

   1. To *brothers and sisters of the whole blood*, and their descendants, in equal degree.
   2. If no whole blood, then to the *brothers and sisters of the half-blood*, as before.
   3. If none of these, then to the *father*; and if he be dead, then to the *mother*.
   4. If there be neither of the above kindred, then to the *paternal grandfather* and his issue, in equal degree; then to the *maternal grandfather* and his issue, in like manner; then to the *paternal great-grandfather*, and his issue, in the same manner; and so on, alternately, *ad infinitum*.

5. If there be no kindred, then the estate, however acquired, goes to the surviving *wife* or *husband*, and their kindred, as an estate by purchase; and if there have been several husbands or wives, all of whom are dead, then to their kindred in equal degree, equally.

6. No distinction is admitted between brothers and sisters of the whole and half blood, all being descendants of the same father, where the estate descended of the part of the father; nor where all are descendants of the same mother, and the estate descended of the part of the mother.

7. Children take by representation. But no representation is admitted among collaterals, after brothers' and sisters' children.

[As between the heir at law and the next of kin, the superior equity cannot be with the latter, the policy of the law being to permit an estate to descend in the line of the ancestor from whom it came. Betts *v.* Wirt, 3 Md. Ch. Decis. 113. Uncles and aunts are entitled to the whole estate in exclusion of the children of deceased uncles and aunts. Levering *v.* Heighe, 2 Md. Ch. Decis. 81; Ellicott *v.* Ellicott, Ib. 468.]

VIRGINIA. Tate's Dig. p. 277–280. 1 Lomax, Dig. p. 595.

1. To the *children* of the intestate, and their descendants.
2. To the *father*.
3. To the *mother* and *brothers and sisters* of the intestate and their descendants.
4. If there be none of these, then the estate goes in moieties, one half to the *paternal*, and the other half to the *maternal kindred*, as follows:—
   1. To the *grandfather*.
   2. To the grandmother and uncles and aunts on the same side, and their descendants.
   3. If none of these, then to the great-grandfather.
   4. To the great-grandmother and great uncles and great aunts, and their descendants; and so on, *ad infinitum;* passing to the nearest lineal male ancestors, and for want of these, to the nearest lineal female ancestors, in the same degree, and their descendants.
5. If an infant die without issue, leaving a *father* or *paternal kindred*, his estate derived *ex parte paternâ*, shall go to them only, excluding the maternal kindred. And so, *vice versâ*, if he leave a *mother* and *maternal kindred*, his estate derived *ex parte maternâ* shall go to these only, exclusive of the paternal kindred.
6. No persons inherit, except children of the intestate, unless in being at the intestate's decease, and capable to take as heirs.
7. When the estate goes in moieties, as above, if there be no kindred, except on one side, the whole estate goes to them. And if the husband or wife be dead, their kindred take the estate, in the same manner as though they had survived the intestate and then died.
8. When the estate goes to ascendants and collaterals, the collaterals of the half-blood take only half as much as collaterals of the whole blood. But if all are of the half-blood, they have whole portions, after giving double portions to the lineal ascendants.
9. When the estate goes to children; or to the mother, brothers, and sisters; or to the grandmother, uncles, and aunts, or to any female lineal ancestors living, together with children of deceased lineal ancestors, male and female, in the same degree, they take *per capita;* but if the degrees are unequal, they take *per stirpes*.
10. The issue of marriages deemed void in law, are regarded as legitimate.

FLORIDA. Thompson's Dig. p. 188, 189, 221.

The course and rules of descent are the same as in Virginia, omitting the last article, No. 10.

If a feme covert dies, having a separate estate, and leaving a husband, he takes an equal share with her children; and if there be no issue, he succeeds to the whole estate.

NORTH CAROLINA. Rev. Stat. 1837, ch. 38. Vol. I. p. 236.

In this State descents are governed by the following general rules:—

1. Inheritances lineally descend to the issue of the person last actually or legally seised; but do not lineally ascend, except as hereinafter stated.
2. Females inherit equally with males; and younger children inherit equally with elder children.
3. Lineal descendants, in all cases and degrees, represent their ancestor.
4. On failure of lineal descendants, the inheritance, derived by descent or otherwise, from an ancestor to whom the intestate was an heir, goes to the next collateral kindred of the blood of that ancestor, subject to Rules 2 and 3.

5. But if the inheritance were not so derived, or the blood of such ancestor be extinct, then it goes to the next collateral kindred of the person last seised, of the paternal or maternal lines; subject to the same rules.

6. The half-blood inherits equally with the whole blood; and the degrees are "computed according to the rules which prevail in descents at common law." Provided, that, if there be no issue, nor brother nor sister, nor their issue, the surviving parent or parents take for life only, and the reversion goes according to the preceding rules.

7. None inherit, unless living at the death of the intestate, or born within ten months after.

8. If there be no heir, the whole goes to the widow. [Lawrence *v.* Pitt, 1 Jones, Law, (N. C.) 344; Moye *v.* May, 1 Jones, Eq. 84; Gillespie *v.* Foy, 5 Ired. Eq. 280; Simmons *v.* Gooding, Ib. 382.]

SOUTH CAROLINA. Stat. at Large, Vol. V. p. 162, 163.

1. One third to the widow in fee; the residue to the children.

2. Lineal descendants in all cases and degrees represent their parents.

3. If there be no issue, then one half goes to the widow, and the other half to the father, if living; but if not, then to the mother.

4. If there be neither issue nor parent, then one half goes to the widow, and the other half to the brothers and sisters, and their issue, by representation.

5. If there be no issue, nor parent, nor brother nor sister of the whole blood; but a widow and a brother or sister of the half-blood, and a child or children of a brother or sister of the whole blood; then one half of the estate goes to the widow, and the other half is equally divided between the brothers and sisters of the half-blood, and the children of brothers and sisters of the whole blood; the children of every deceased brother and sister of the whole blood taking among them a share equal to the share of a brother or sister of the half-blood. But if there be no brother nor sister of the half-blood, then this entire half goes to the children of brothers and sisters of the whole blood. And if there be no child of the whole blood, then to the brothers and sisters of the half-blood. [Perry *v.* Logan, 5 Rich. Eq. 202; Felder *v.* Felder, Ib. 509; Payne *v.* Harris, 3 Strobh. Eq. 89.]

6. If there be no issue, nor parent, nor brother nor sister of the whole blood, nor their children, nor any brother nor sister of the half-blood, then one half goes to the widow, and the other half to the lineal ancestors; but if there be no lineal ancestor, then the widow takes two thirds, and the residue goes to the next of kin.

7. If there be no widow, her share in each of the preceding cases, goes into the residue.

8. The husband, on the decease of the wife, takes the same share in his wife's estate, that she would have taken in his, had she survived him.

9. If there be no widow nor issue, but there be a surviving parent, and brothers and sisters, then it goes in equal shares to the father, (or, if he be dead, to the mother,) and to the brothers and sisters, and their issue, by representation. See Vol. V. p. 305.

10. If there be no issue, parent, nor brother nor sister of the whole blood, nor their children, nor brother nor sister of the half-blood, nor lineal ancestor, nor next of kin, the whole goes to the surviving husband or wife. See Vol. VI. p. 284, 285.

11. Alienage of the widow is no bar to her taking under the preceding rules. See Vol. VI. p. 284, 285; *Ante*, Vol. I. tit. I. § 39, note.

GEORGIA. Rev. Stat. 1845, ch. 18, p. 466. (Hotchk. Dig.)*

1. To the widow and children, in equal shares; and to the representatives of children, *per stirpes*.

* See "Table of Descents," at end of Appendix. Hotchk. Dig. p. 957.

2. If there be a widow and no issue, then half to the widow, and the other half to the next of kin. But if there be issue, and no widow, then the whole goes to the issue.

3. If there be neither widow nor issue, then it goes to the next of kin in equal degree, and their representatives. But no representation is admitted among collaterals, beyond brothers' and sisters' children.

4. If the father or mother be alive when the intestate dies without issue, the father, (or if he be dead, then, and not otherwise, the mother,) "shall come in on the same footing as brother or sister would do." Provided, that if the mother has married again, she takes no part of the intestate's estate, unless he shall be the last or only child.

5. If there be no issue, but there be brothers or sisters of the whole, and also of the half-blood, then the brothers and sisters of the whole and half-blood, in the paternal line only, shall inherit equally. But if there be none of these, nor their issue, then those of the half-blood and their issue, in the maternal line, shall inherit.

6. The degrees of consanguinity are to be investigated by the following rules, viz.: "children shall be nearest; parents, brothers, and sisters shall be equal in respect to distribution; and cousins shall be next to them."

7. Cases not provided for by statute, are to be "determined by the common law of this land, as it hath stood since the first settlement of this State," except that real and personal estate are to be distributed in the same manner.

[A widow entitled to property, married before coming into possession thereof, having one child then living. *Held*, that this child, herself, and all her children were entitled to an equal share of that property. Matthews *v.* Bridges, 13 Geo. 325. If there are two sets of children from the same mother, the one legitimate and the other not, and one of the illegitimates dies intestate and without issue, the legitimate half brothers and and sisters are not, under the statutes of Georgia, co-distributees of the estate of the deceased, with the illegitimates. Allen *v.* Donaldson, 12 Geo. 332.]

KENTUCKY. Rev. Stat. 1834, Vol. I. Tit. LXI. p. 562, 563.

1. To children, and their descendants.
2. To the father.
3. To the mother, brothers, and sisters, and their descendants.
4. If none of these, then one moiety to the paternal, and the other moiety to the maternal kindred, in the following order: —
   1. To the grandfather.
   2. To the grandmother, uncles, and aunts of the same side, and their issue.
   3. To the great-grandfathers, or great-grandfather, if there be but one living.
   4. To the great-grandmothers, or great-grandmother, and great uncles and great aunts, and the descendants of these.
   5. In the same manner, *ad infinitum*; first to the nearest lineal male ancestors, and then to the females, in the same degree, and their descendants.
5. No right accrues to any persons, other than to children of the intestate, unless they were in being at the intestate's decease, and capable to take as heirs.
6. If an infant die without issue, having an estate derived *ex parte paternâ*, the mother shall not take, (except her dower,) if there be living any brother or sister of the intestate, or any brother or sister of the father, or issue of either of them. Nor shall the father take, (saving his tenancy by the curtesy,) any part of an estate derived by the infant *ex parte maternâ*, if there be living any brother or sister of the intestate or of his mother, or issue of either of them.

7. Where the estate goes by moieties, as in Rule 4, if there be no kindred on the one side, the whole goes to those on the other side. If there be no kindred on either side, the whole goes to the wife or husband; and if they be dead, then to his or her kindred, as if the husband or wife had survived the intestate, and then died.

8. When the estate goes to ascendants and collateral kindred, the collaterals of the half-blood take only half as much as those of the whole blood. But if all the collaterals are of the half-blood, they take whole portions, giving double portions to the lineal ascendants.

9. Where the intestate's children, or mother, brothers, and sisters, or grandmother, uncles, and aunts, or any female lineal ancestors living, with children of deceased lineal ancestors, male and female, in the same degree, come into the partition, they take *per capita*; but if in unequal degrees, they take *per stirpes*.

10. The issue of marriages deemed null in law, are nevertheless legitimate.

[Wells *v.* Head, 12 B. Mon. 166; Renfroe *v.* Taylor, Ib. 402.]

TENNESSEE. Car. & Nich. Dig. p. 247–250.

1. To the sons of the intestate equally; and for want of sons, then to his daughters, equally; and to their issue, in like manner; viz., first to sons, and secondly to daughters; the children, in each degree, representing their parent.

2. If no issue, then to his brothers; and for want of brothers, then to his sisters; as well those of the half-blood as those of the whole blood, equally; and their issue, by representation, viz., first to sons, and if no sons, then to daughters. But if it be a *paternal* inheritance, and the brothers and sisters on the sides both of the father and of the mother are of the half-blood, it goes to those of the father's side only, until the paternal line is exhausted of the half-blood; and if it be a *maternal* inheritance, then, *vice versâ*, the like rule prevails, to the exclusion of the paternal line; the estate going first to brothers, and if none of these, then to sisters, as before.

3. The same rules apply to lineal descendants and collaterals, of remoter degrees than the above.

4. If there be no issue, nor brother nor sister nor their issue, then the estate goes to the father, if living; but if no father, then to the mother for her life only, and after her death, then to the heirs on the part of the father, and for want of such, then to the heirs on the part of the mother.

5. If the heir of the person last seised is an alien, resident in the United States at the decease of the ancestor, and within one year from that time shall declare his intention to become a citizen of the United States pursuant to the acts of Congress, he shall be entitled to succeed to the real estate, as heir. Stat. 1848, ch. 165, § 4. [Nesbit *v.* Bryan, 1 Swann. 468; Deadrick *v.* Armour, 10 Humph. 588.]

OHIO. Rev. Stat. 1841, ch. 39. Walker's Introd. § 366–371.

Ancestral estates descend in the following order: —

1. To the children, and their issue, however remote.

2. To the brothers and sisters of the intestate, and their issue, however remote, whether of the half or whole blood, provided they be of the blood of the ancestor.

3. To the ancestor, if living.

4. To the children of the ancestor, and their issue; and if there be none of these, then to his brothers and sisters and their issue.

5. To the intestate's brothers and sisters, of the half-blood, and their issue, though they be not of the blood of the ancestor.

6. To the next of kin of the intestate, being of the blood of the same ancestor.
7. To the husband or wife.

Estates *not ancestral* descend in the following order: —

1. To the children and their issue, however remote.
2. To the brothers and sisters of the whole blood, and their issue, however remote.
3. To the brothers and sisters of the half-blood, and their issue, however remote.
4. To the father, if living; if not, then to the mother.
5. To the next of kin, of the blood of the intestate.
6. If there be no kindred, or they be aliens, residing out of the State, then to the surviving husband or wife, unless the alien shall appear and prosecute his claim within ten years from the intestate's death.
7. If no such heirs, it escheats to the State.

[The word "ancestor," as used in the act of 1831, "regulating descents, &c.," means any one from whom the estate was inheritable, and the "ancestor" from whom the estate must, in law, be understood "to have come to the intestate," is he from whom it was immediately inherited. Prickett *v.* Parker, 3 Ohio, N. S. 394. See Curren *v.* Taylor, 19 Ohio, 36; Penn *v.* Cox, 16 Ohio, 30.]

INDIANA. Rev. Stat. 1843, ch. 28, art. 5, p. 433–440.

1. To the *children*, and their issue; *per capita*, if in equal degree; if not, *per stirpes*.
2. If no issue, then *half* to the *father and mother*, as joint tenants, or to the surviving parent; and the *other half* to the *brothers and sisters*, and their issue.
3. If no brothers nor sisters, nor their issue, then the whole goes to the *parents*, as joint tenants; but if the father only be living, he takes the whole, unless the inheritance came *ex parte maternâ*. If the father be dead, or incapable of inheriting, the mother takes the whole.
4. If there be no parent living, the whole goes to the *brothers and sisters* of the intestate, and their issue.
5. If there be none of the descendants nor relatives mentioned in the preceding rules, then the *paternal* estate descends as follows:—
   1. To the *paternal grandfather and grandmother*, as joint tenants, or to the survivor of them.
   2. To the *paternal uncles and aunts*, and their issue.
   3. To the *next of kin*, in equal degree of consanguinity to the intestate, among the paternal kindred.
   4. If none of these, then to the *maternal kindred*, in the same order.

Maternal inheritances descend among the maternal kindred by the same rules, *vice versâ;* and on failure of these, then to the paternal kindred, as above.

Estates *not ancestral* descend as follows:—

1. On failure of issue, parents, brothers, and sisters, and their issue, the estate goes, *one half* to the *paternal* kindred, according to Rules 1, 2, & 3, last above stated.
2. If there be no paternal kindred, then this half goes to the *widow* of the intestate, if any; but if none, then it goes to the *maternal* kindred, in the like manner.
3. The *other half* goes to the *maternal* kindred in the same order.
4. If there be no maternal kindred, then this half goes to the *widow* of the intestate, if any; but if none, then it goes to the *paternal* kindred, in the same manner as in Rule 2, last above.

6. Among *collaterals*, all in equal degree, however remote from the intestate, take *per capita*; and if they be in unequal degrees, they take *per stirpes*, by reference to the nearest ancestor of nearest degree to the intestate. Those claiming through the nearest ancestor are preferred to those claiming through one more remote, though the claimants themselves be in the same degree.

7. Kindred of the half-blood share equally with those of the whole blood, in equal degree; except in the case of ancestral estates; which they do not inherit, unless they be of the blood of the ancestor. But if there be none of the whole blood in equal or nearer degree, nor their descendants, then the half-blood take the ancestral estate, as if they were of the whole blood.

8. Where the inheritance came to the intestate by gift, or in consideration of natural love and affection, and the donee dies without issue, it reverts to the *donor*, if he be still living; saving the lien of the husband or wife of the donee, for the value of their lasting improvements thereon.

9. The *widow* of the intestate may elect to waive her dower, and instead thereof to come in as an heir to the estate, in the cases and to the extent following; namely:—When the estate descends as in Rule 5, No. 1 and 2, *supra*, to grandparents, or uncles and aunts and their issue, she may take one third;—when, in any case not otherwise specified, it descends "to the next of kin in equal degree," she may take one half;—and when there are none of the heirs described in any of the preceding rules, she may take the whole.

10. If there be no heirs entitled to take as above, the land escheats to the State, to be applied to the support of common schools in the town where the land lies.

[McClerry *v.* Matson, 2 Carter, 79; Cunningham *v.* Doe, 1 Smith, 34.]

ILLINOIS. Rev. Stat. 1839, p. 696, 697.

1. To the children and their issue; "the descendants of a deceased child or grandchild taking the share of their deceased parent, in equal parts among them."

2. If there be no issue nor widow, then to the parents, brothers, and sisters and their issue, in equal parts; but if only one parent be living, that one takes a double portion.

3. If there be no parent, then to the brothers and sisters and their issue.

4. If there be a widow and no issue, she takes one half.

5. If there be none of these, then the estate goes in equal parts to the next of kin in equal degree.

6. No representation is admitted among collaterals, except among the descendants of the brothers and sisters of the intestate.

7. The half-blood inherits equally with the whole blood.

[See Rev. Stat. 1845; Tyson *v.* Postlethwaite, 13 Ill. 732.]

MISSOURI. Rev. Stat. 1845, ch. 50, p. 421, 422.

1. To children and their issue, in equal parts.

2. To the father, mother, brothers, and sisters, and their descendants, in equal parts.

3. To grandparents, uncles, and aunts, and their descendants, in equal parts.

4. To great-grandparents and their descendants, equally; and so on, to the nearest lineal ancestor and their descendants.

5. If there be no kindred, then to the husband or wife, if living; but if not, then to their kindred, as if the husband or wife had survived the intestate, and then died.

6. When the estate goes to ascendants and collaterals, the collaterals of the half-blood, if any, take only half as much as those of the whole blood. But if all the col-

laterals are of the half-blood, they take whole portions, only giving to the ascendants double portions.

7. Where lineal descendants of equal degree, or parents and brothers and sisters, or grandparents, uncles, and aunts, or any living ancestor, and their children, come into partition, they take *per capita*. But if the degrees be unequal, they take *per stirpes*.

8. The issue of marriages deemed null, are legitimate.

[The grandfather, grandmother, uncles, and aunts of the intestate, on the side of the parent from whom he inherited, are not preferred to the kindred of equal degree on the side of the other parent. Peacock *v.* Smart, 17 Mis. (2 Bennett,) 402. See Childress *v.* Cutter, 16 Ib. 24.

MICHIGAN. Rev. Stat. 1846, ch. 67, p. 273.

1. To the children and their issue; *per capita*, if in equal degree; otherwise *per stirpes*.

2. If there be no issue, then to the widow for life; the reversion to the father. But if no widow, then the whole to the father.

3. If neither issue, widow, nor father, then in equal shares to the mother, brothers. and sisters living, and the children of any deceased brother or sister by representation.

4. If there be neither issue, nor widow, nor father, nor brother nor sister living at the intestate's decease, then the whole goes to his mother, excluding the issue of deceased brothers and sisters.

5. If there be no issue, widow, parent, brother, nor sister, then the estate goes to the next of kin in equal degree; collaterals claiming through the nearest ancestor, to be preferred to those claiming through one more remote.

6. But if the intestate leave a child or children living, and the issue of any deceased child, and any child should afterwards die under age and unmarried, his share goes to the other children of the same parent and the issue of any deceased child, by representation.

7. If at the death of such child, under age and never married, all his brothers and sisters are dead, and there be any issue of them, his share goes to such issue, *per capita*, if in equal degree; otherwise, *per stirpes*.

8. If there be a widow, but no kindred, the widow takes the whole.

9. If there be neither widow nor kindred, the land escheats to the State, for the benefit of the primary school-fund.

10. The half-blood inherits equally with the whole blood; unless the estate be derived from an ancestor by descent, devise, or gift; in which case none inherit who are not of the blood of that ancestor.

MISSISSIPPI. Rev. St. 1840, ch. 36, p. 393, 394.

1. To the children and their issue; children of a deceased parent always taking the share of their parent.

2. To the brothers and sisters of the intestate, and their issue.

3. If there be none of these, then to the father, if he be living; if not, then to the mother.

4. If there be neither issue, parent, brother, nor sister, nor their issue, then to the next of kin, in equal degree.

5. No representation is admitted among collaterals, except with the intestate's brothers and sisters.

6. No distinction is admitted between the half and the whole blood; except that the whole blood is preferred to the half-blood, in the same degree.

LOUISIANA. Civil Code, art. 882–910.

1. To the children, and their issue; if in equal degree, then *per capita;* otherwise, *per stirpes.*

2. To the parents of the intestate, one moiety; and the other moiety to his brothers and sisters, and their issue. If one parent be dead, his or her share goes to the brothers and sisters of the deceased, who thus have three fourths. If both parents be dead, the whole goes to the brothers and sisters, and their issue.

3. The partition of the portion falling to the brothers and sisters, is made in equal parts, if they are all of the same marriage. If they are of different marriages, it is divided equally between the paternal and maternal lines of the intestate, the german brothers and sisters taking a part in each line. If the brothers and sisters are on one side only, they take the whole, to the exclusion of all relations of the other line.

4. If there be no issue, nor parent, nor brother, nor sister, nor their issue, then the inheritance goes to the *ascendants* in the paternal and maternal lines, one moiety to each; those in each line taking *per capita.* If there is in the nearest degree but one ascendant in the two lines, he excludes all others of a remoter degree, and takes the whole.

5. If there be none of the heirs mentioned in the preceding rules, then the inheritance goes to the collateral relations of the intestate; those in the nearest degree excluding all others. If there are several persons in the same degree, they take *per capita.*

6. Representation takes place *ad infinitum* in the direct descending line; but does not take place in favor of ascendants; the nearest in degree always excluding those of a degree superior or more remote.

7. In the collateral line, representation is admitted in favor of the issue of the brothers and sisters of the intestate, whether they succeed in concurrence with the uncles and aunts, or whether, the brothers and sisters being dead, their issue succeed in equal or unequal degrees.

8. Where representation is admitted, the partition is made *per stirpes;* and if one root has produced several branches, the subdivision is also made by roots in each branch, and the members of the branch take between themselves *per capita.*

ALABAMA. Toulm. Dig. p. 885, 886.

1. To the children, and their descendants, equally; the descendants of the deceased child or grandchild to take the share of their deceased parent, in equal parts among them.

2. To the brothers and sisters of the intestate, and their descendants, equally; the descendants of a brother or sister of the intestate to have, in equal parts among them, their deceased parent's share.

3. To the father, if he be living; if not, to the mother.

4. If there be none of these, then the estate descends to the next of kin, in equal degree.

5. No representation is admitted among collaterals, except with the descendants of the brothers and sisters of the intestate.

6. No distinction is admitted between the whole and half-blood; except that kindred of the whole blood, in equal degree, shall be preferred to kindred of the half-blood, in the same degree.

ARKANSAS. Rev. Stat. 1837, ch. 49, p. 328.

1. To the children of the intestate; and their issue, by representation, in all degrees, however remote.

2. To the father, if living; if not, to the mother.

3. To the brothers and sisters of the intestate and their descendants.

4. If none of these, then to the grandparents, uncles, and aunts, and their descendants, equally; and so on, passing to the nearest lineal ancestor, and their issue.

5. Posthumous children of the intestate may inherit; but no right accrues to any other persons, unless born at the time of his decease.

6. The issue of marriages deemed null, are legitimate.

7. If there be no issue, paternal estates go to the father and his heirs; and maternal estates go to the mother and her heirs. But estates of new acquisition go to the father for his life; and if no father, then to the mother for her life; and in either case, the reversion goes to the collateral kindred.

8. If there be no parent, and no nearer kindred, the estate goes to the father's brothers and sisters, and their descendants; and if none of these, then to the brothers and sisters of the mother, and their descendants.

9. If there be no kindred, the estate goes to the surviving husband or wife, if any; and if not, then it escheats to the State.

10. The half-blood inherits equally with the whole blood, in the same degree; but if the estate be ancestral, it goes only to those of the blood of the ancestor from whom it was derived.

11. In all cases not provided for by the statute, the inheritance descends according to the course of the common law.

In all the American States, the principle is recognized, that if the child has received from the parent, in his lifetime, any portion of the estate which would have fallen to him by inheritance, it shall be deducted from his share, in the distribution of the estate. But it must appear that this *advancement* to the child was intended by the parent, not as a gift, but as a part of his inheritance. The rules of evidence, or acts of the parent, designated as proofs of this intent, are various in the statutes of the several States; but the principle, namely, the intention of the parent, is the same in all. In some States the application of the rule extends only to advancements, made to children; in others, to children and their issue; and in others, to any heir whomsoever. Any further notice of this provision would hardly comport with the plan of this work. See 4 Kent, Comm. 417–419. [See Hartwell *v.* Rice, 1 Gray, 587; Law *v.* Smith, 2 R. Isl. 244; Riddle's Estate, 19 Penn. (7 Harris,) 431; High's Appeal, 21 Ib. 283; Gordon *v.* Barkalew, 2 Halst. Ch. R. 94; Young's Estate, 3 Md. Ch. Decis. 461; Hayden *v.* Burch, 9 Gill, 79; Lee *v.* Boak, 11 Gratt. 182; Ison *v.* Ison, 5 Rich. Eq. 15; Credle *v.* Credle, Busbee, Law, (N. C.) 225; Hanner *v.* Winburn, 7 Ired. Eq. 142; Smith *v.* Smith, 21 Ala. 761; Grey *v.* Grey, 22 Ib. 236; Burnett *v.* Branch Bank, Ib. 642; Wilson *v.* Wilson, 18 Ib. 176; Crosby *v.* Covington, 24 Miss. 619; Hook *v.* Hook, 13 B. Mon. 526; Dudley *v.* Bosworth, 10 Humph. 9; Creed *v.* Lancaster Bank, 1 Ohio, State R. 1.]

In regard to the admission of persons of the *half-blood* into the inheritance, it appears above that the rules in the different States are various. In *Maine*, *Massachusetts*, *Vermont*, *North Carolina*, and *Illinois*, they are admitted in all cases, equally with the whole blood, by express statute.

In *New York*, *Virginia*, *Florida*, *Indiana*, *Michigan*, and *Arkansas*, the rule is the same, with the exception of ancestral estates.

In most of the other States they are also admitted by statute, either after the whole blood, or with certain qualifications, conditions, and restrictions. Such is the case in *Connecticut*, *New Jersey*, *Pennsylvania*, *Delaware*, *Maryland*, *South Carolina*, *Georgia*, *Kentucky*, *Tennessee*, *Ohio*, *Missouri*, *Mississippi*, and *Alabama*.

CHAP. IV.

DESCENT OF ESTATES IN REMAINDER AND REVERSION.

SECT. 1. *Go to the Heirs of the Person in whom they first vested.*

SECT. 8. *A Right to a Remainder goes to the Half-Blood.*

18. *An Act of Ownership operates as a Seisin.*

SECTION 1. The rules laid down in the preceding chapter respecting the descent of estates in possession, did not, at common law, apply to the descent of estates in remainder or reversion, expectant on an estate of freehold; because where there was a preceding estate of freehold, the actual seisin was in the possessor of that estate, and not in the person entitled to the remainder or reversion.[1]

2. It followed from the above principle, that where a person entitled to an estate in remainder or reversion, expectant on a freehold estate, died during the continuance of the particular estate, the remainder or reversion did not descend to his heir; because he never had a seisin to render him the stock or root of an inheritance; but it descended to the person who was heir to the first purchaser of such remainder or reversion, at the time when it came into possession.[2]

3. Thus it was laid down by the Court of King's Bench, in 34 Eliz. that "Of a reversion or remainder expectant on an estate for life, or in tail, there he who claims the reversion as heir, ought to make himself heir to him who made the gift or

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[1] In all the United States, except, perhaps, the States of *Maryland*, *Mississippi*, and *Alabama*, this rule of the common law is changed by the operation of the statutes o descent; and every right of the ancestor to lands, as well in remainder and reversion as in possession, descends to his heir, as it now does in England by the statute of 3 & 4 Will. 4, c. 106. See *ante*, ch. 3, § 1, note 2; Vanderheyden *v.* Crandall, 2 Denio, R. 9; 4 Kent, Comm. 388. And see Ames *v.* Gray, cited 4 Mason, 491; Cook *v.* Hammond, 4 Mason, 467; Williams *v.* Amory, 14 Mass. 20; Whitney *v.* Whitney, Ibid. 88; Russell *v.* Hoar, 3 Met. 187.

[2] The origin and principle of this rule are fully stated and expounded in Watkins on Descents, ch. 3, sec. 1, 2.

lease; if the reversion or remainder descend from him: or if a man purchase such reversion or remainder, he who claims as heir ought to make himself heir to the first purchaser." (*a*)

379 * 4. * In the case of Kellow *v.* Rowden, it was held by all the Judges, that where an estate for life or in tail is created, and the reversion in fee expectant thereon descends from the donor or settlor, through several intermediate heirs, before it falls into possession; every person claiming it by descent must make himself heir to the donor or settlor, and take it as such; and not as heir to the intermediate heirs, who need not be so much as named in an action brought against the person so acquiring the possession, as heir to the donor or settlor. For the intermediate heirs never had such a seisin as to transmit the reversion from them, by descent, to any person who was not heir to the donor or settlor. (*b*)

5. D. Smith, in consideration of his marriage with Sarah Madey, in 1716, settled the premises in question to the use of himself and the said Sarah during their natural lives, and the life of the survivor of them; remainder to the heirs of the body of the said Sarah by the said David; remainder to the said David, his heirs and assigns for ever. There was issue of the marriage one daughter, named Elizabeth, and no other child. Upon the death of the said Sarah, David Smith married a second wife; and by her had issue, Ann, the lessor of the plaintiff, and no other child. Elizabeth, the daughter of the said David, by Sarah his first wife, intermarried with John Waters, and upon that marriage, David Smith delivered up the possession of the premises to John Waters, but did not execute any conveyance thereof to him. In 1738, David Smith died, leaving issue only Elizabeth by his first wife, and Ann by his second wife; and about twelve months after, Elizabeth died, leaving issue one son, who was born after the death of David his grandfather, and died an infant, soon after the death of his mother. The said David Smith had no brother, but left a sister named Jane (married to one Gilbert) who was heir at law to Elizabeth, the daughter of David Smith, by his first wife, and to her son; and upon the death of John Waters, Gilbert and his wife entered

(*a*) Ratcliff's case, 3 Rep. 42 a. 1 Inst. 14 a, n. 6.
(*b*) (3 Mod. 253. Carth. 126. 1 Show. 244, S. C.) Tit. 17, s. 29.

on the premises. Ann, the daughter of David Smith by his second wife, claimed the estate, as heir at law to her father; and brought an ejectment against Gilbert and his wife.

Serjeant Wilson reports the Court to have been of opinion that Ann had no title to the premises. But it is truly observed by Mr. Watkins, in his Essay on the Law of Descents, that *the judgment is evidently misstated, or wrongly printed; *380 that in a note of this case taken by Mr. Serjeant Hewit, afterwards Lord Chancellor of Ireland, the adjudication is thus given: "In this case it was clearly agreed, that by the settlement of 1716, David Smith was tenant for life; his wife was tenant in tail, with the reversion in David Smith; and thereupon this point was made, whether the reversion in fee descended upon the two daughters of David, *viz.*, Elizabeth by his first wife, and Ann by his second wife, in such manner as that upon the determination of the estate tail which descended upon Elizabeth, and from her upon her son, and expired by his death without issue, it should go in moieties; *viz.*, one moiety to Ann, and the other to the heirs of Elizabeth; or whether it should not go all to Ann as heir to her father, who was last actually seised of the reversion."

The Judges were of opinion, "that though the reversion descended upon the two daughters of David, on his death, yet they were not actually seised of that reversion during the continuance of the estate tail, but the same was expectant thereon; and as whoever takes by descent must take as heir to him who was last actually seised, therefore Ann took the reversion wholly as heir to her father. And as to this, 1 Inst. 14, 15, and Kellow *v.* Rowden, in Carthew and Shower, were held to be authorities in point."

Lord Alvanley has observed that the preceding case was misstated in Wilson; as all the reasoning showed it must have been determined in favor of the lessors of the plaintiff. (*a*)†

(*a*) Jenkins *v.* Prichard, 2 Wils. 45. Watkins on Descents, 2d edit. 143, n. (g.) Doe *v.* Hutton, 3 Bos. & Pul. Rep. 658. Goodright *v.* Searle, Ferne Cont. Rem. 561, 6th ed.; Goodtitle *v.* White, 15 East, 174.

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† [But now by the late statute 3 & 4 Will. 4, c. 106, in all cases of descents upon deaths after the 1st day of January, 1834, the law of inheritance is the same with respect to estates in possession, remainder, or reversion.

By the first section, the act applies to estates of inheritance for life or lives or other

6. A right to an estate in remainder or reversion went to the half-blood; for where a person having such a right died
381* before the estate in remainder or reversion * fell into possession, he could not acquire such a seisin as to become the stock of an inheritance. Therefore his heir of the half-blood, if he was heir to the donor or settlor of the remainder or reversion, became entitled to it.

382* 7. * Where the person entitled to a remainder or reversion exercises an act of ownership over it, by granting it for life, or in tail; this, by the common law, is deemed equivalent to an actual seisin of an estate, which is capable of being reduced into possession by entry; and will make the person exercising it a new stock or root of inheritance. For an entry being impossible, the alienation of the remainder or reversion for a certain
383* time is allowed to be * sufficient to change the descent; because such alienation, being formerly always attended with attornment, was deemed equal in point of notoriety to an entry on a descent. †

8. Lord Coke, after stating the case of a son's endowing his father's widow, says:—"But if the eldest son had made a lease for life, and the lessee had endowed the wife of his father, and tenant in dower had died, the daughter should have had the reversion, because the reversion was changed and altered by the lease for life; and the reversion is now expectant on a new estate for life." In another place he says,—"for many times the change of the freehold makes an alteration or change of the reversion." This doctrine has been confirmed by Lord Hardwicke in the following case. (*a*)

9. A, being tenant for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in

(*a*) 1 Inst. 15 a. 8 Rep. 35 b. Id. 191 b.

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estates transmissible to heirs, and to any possibility, right, or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency.]

[† But now, in all descents occurring on deaths after the 1st day of January, 1834, the heirship is traced from the person last entitled, or who had a right to the estate, whether he did or did not obtain possession, or the receipt of the rents and profits; and whether the estate is in possession, remainder, reversion, or in contingency. 3 & 4 Will. 4, c. 106, s. 1.]

tail male, remainder to the heirs of his own body, remainder to the right heirs of his father, had a sister of the half-blood, and also a sister of the whole blood. A conveyed the estate to B by lease and release, in trust for payment of debts, and levied a fine thereof.

Lord Hardwicke said, the question was, whether A had made any alteration as to the descent of the reversion in fee. If he had not, it would descend to the sister of the half-blood, who was the elder daughter, and equally heir to the father with the other daughter. But if he had altered it, and given it to himself, it would descend to the sister of the whole blood, who claimed as heir to her brother, who was last actually seised, and who would be entitled under that known rule of law, that *possessio fratris de feodo simplici facit sororem esse hæredem.* But then it was certain that must be an actual possession; so that it was argued in this case that this being an estate for life in A with a remainder in tail, and a reversion in fee expectant; this was not such a possession as would entitle the younger daughter to take under a *possessio fratris.*

* What was insisted upon on the other hand, in order *384 to have altered the course of descent and given it to the heirs of A instead of the father, was, that A had made a lease and release, and thereby conveyed the estate to B, in trust for the payment of debts, &c., and levied a fine thereof; but had not suffered a recovery. And the question was, whether this fine had changed the reversion in fee, and thereby altered the descent.

He was of opinion that it did alter the reversion; and therefore the estate would go to the right heirs of A; and founded his opinion on the two passages stated in a former section from Coke on Littleton, 15 *a*, and 191 *b;* from which it appeared, that in consequence of such change in the reversion, it should descend to the heir of the son; and therefore entitle the younger sister of the whole blood to claim as heir to him by a *possessio fratris.* The conveyance was by lease and release to B, to pay debts, &c.; and surely this was a great alteration, for this amounted to a grant of his estate for life. It likewise passed the reversion in fee; for as he was right heir of his father, he had a reversion to grant, though it would descend to the right heirs of the father, without any such alteration; and though the

estate was subject to redemption on payment of the debts, &c., yet it would follow the heirs of the son, because the son had changed it, and made it his own by a plain alteration.

He then said he should consider what would be the effect of the fine, supposing the lease and release out of the case. That fine would certainly have barred the remainder in tail to himself, for he was seised for life, with remainder to the heirs of his own body; so that the fine barred the estate, and would have amounted to a grant of the reversion in fee, if to a stranger. Now this reversion in fee, instead of being expectant on the estate tail, as it originally was, did now depend on an estate in contingency. Therefore on this case, whether the reversion being thus changed, should alter the descent of it, so as to go to the heirs of the son, he was clearly of opinion that it was literally within what was laid down in Co. Lit. 191 *b*, that if the elder brother change the freehold, it shall alter the reversion likewise, and shall cause a *possessio fratris.* In this case both the conveyances changed the reversion, and therefore the estate descended to the heir of the whole blood, to the brother. (*a*)

(*a*) Stringer *v.* New, 9 Mod. 363. (4 Mason, 485. 10 Met. 393. *Ante*, ch. 3, s. 41, note.) *Vide* tit. 35.

CHAP. V.

DESCENT BY STATUTE AND CUSTOM.[1]

[1] This chapter, containing nothing applicable to the law of descents in the United States, is omitted.

TITLE XXX.

ESCHEAT.

BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES. Book II. ch. 15.
KENT'S COMMENTARIES. Vol. IV. Lect. 66, § 1.
FLINTOFF on Real Property. Vol. II. Book I. ch. 9.
STEPHEN'S COMMENTARIES, Book II. Pt. I. ch. 12.

SECT. 1. *Title by Purchase.*
6. *Escheat.*
10. *For Default of Heirs.*
11. *For Corruption of Blood.*
14. *No Escheat where there is a Tenant.*
17. *Any Alienation prevents an Escheat.*
21. *What things Escheat.*
23. *A Trust Estate does not Escheat.*
26. *Nor an Equity of Redemption.*
SECT. 27. *Nor Money to be laid out in Land.*
28. *To whom Lands Escheat.*
29. *The Lord by Escheat may distrain for Rent.*
30. *Entitled to a Term to attend.*
32. *And to all Charters.*
33. *Is subject to Incumbrances.*
34. *Was not bound to execute an Use.*
35. *Is not subject to a Trust.*
41. *Office of Escheator.*

SECTION 1. Of the two modes of acquiring a title to real property, the first, namely, descent, has been treated of in the preceding title. We now therefore come to the second, that is, *purchase*, which is thus *defined* by Littleton, s. 12:—"Purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh, not by title of descent from any of his ancestors or cousins, but by his own deed.[1]

2. Lord Coke, in his comment on this section, observes that a

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[1] We have already seen that Mr. Hargrave denies the accuracy of stating *descent* as one of the *two modes* of acquiring real property, it being only one of the methods of acquiring property by *act of law*. It is this latter expression which embraces all the modes of acquisition, other than the act of the party; and under this head falls the title by escheat; which, strictly speaking, is a title neither by purchase alone, nor by descent alone, but by both. See *ante*, Tit. XXIX. ch. I. § 22, note; 1 Inst. 18 b, note 106.

purchase is always intended by title, and most properly by some kind of conveyance, either for money, or for some other consideration, or freely of gift; for that is, in law, also a purchase. And accordingly the makers of the statute, 1 Hen. V. c. 3, speak of those who have lands or tenements by purchase, or descent of inheritance. (*a*)

3. The feudal writers call purchase *conquestus* or *conquisitio*, both denoting any means of acquiring an estate out of the *common course of inheritance. The Norman jurists *397 styled the first purchaser, or person who first acquired the estate, the *conquereur;* and Glanville uses the word *questus* to denote the property which a person has acquired by his own act, and not by descent. (*b*)

4. The *difference* between the acquisition of an estate by *descent* and by *purchase* consists principally in *two points.* 1. That by purchase the estate acquires a new inheritable quality, and is *descendible to the owner's blood in general*, as a feud of indefinite antiquity. 2. That an estate taken by purchase will *not* make the person who acquires it *answerable for the acts of his ancestors*, as an estate by descent will.

5. Sir W. Blackstone has enumerated the following modes of acquiring an estate,—by Purchase, Escheat, Occupancy, Prescription, Forfeiture, and Alienation. Of these we shall only treat of *Escheat*, *Prescription*, and *Alienation;* Occupancy having been already noticed in Title III, c. I., and Forfeiture being noticed in that and several other titles.

6. It has been stated that, by the feudal law, when the tenant *died without heirs*, the lord became entitled to the feud.[1] This law, which was introduced here by the Normans, is founded on the principle that the blood of the person last seised in fee simple is by some means or other utterly extinct and gone; and since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence that the inheritance itself must fail; the land must become what the

(*a*) 1 Inst. 18 b. Plowd. 47. (*b*) Glanv. Lib. 7, c. 1.

[1] In the United States, as there are no feudal tenures, private persons do not succeed to the inheritance by escheat; but the State succeeds in place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction. 4 Kent, Comm. 424; 3 Dane, Abr. 140, § 24.

feudal writers call *feodum apertum*, and result back to the lord of the fee, from whom, or from whose ancestor it was originally derived. (*a*)

7. This mode of acquiring an estate is called an *escheat;* which Lord Coke says is a word of art, derived from the French word *eschier*, *quod est accidere;* for an escheat is a casual profit, *quod accidit domino ex eventu et ex insperato*, which happens to the lord by chance, and unlooked for. An *escheat* is therefore, in fact, a *species of reversion*, and is so called and treated by Bracton.[1] When a power of alienation was introduced, the change of the tenant changed the chance of the escheat, but did not destroy it; and when a general liberty of alienation was allowed, without the consent of the lord, this right became a sort of caducary succession, the lord taking as *ultimus hæres.* (*b*)

398 * *8. Fitzherbert says, a writ of escheat † lies where a tenant in fee simple of any lands or tenements, which he holds of another, dies seised without any heir general or special, the lord shall have a writ of escheat against him who is tenant of the lands, after the death of his tenant, and shall recover the land; because he shall have the same in lieu of his services. (*c*)

9. Mr. Hargrave has justly observed that an escheat, in appearance, participates in the nature both of a purchase, and of a descent. Of the former, because some act of the lord is requisite to perfect his title; and the actual possession of the land cannot be gained till he enters, or brings his writ of escheat; of the latter, because it follows the nature of a seignory, and is inheritable by the same person. (*d*)

10. An escheat may *happen in two ways.* 1. *Per defectum sanguinis*, that is, for *default of heirs;* 2. *Per delictum tenentis*, that is, *for crime.* Escheats arising from default of heirs, whereby the descent is at an end, can only be in the three following

(*a*) Diss. c. 1, s. 71. 2 Inst. 64. Wright's Ten. 115. See Doe *v.* Redfern, 12 East, 96.
(*b*) 1 Inst. 13 a, 92 b. Bract. 23 a. (*c*) F. N. B. 143. (*d*) 1 Inst. 18 b, n. 2.

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[1] The doctrine of escheats is thus expressed by Fleta. *Dominus verò capitalis loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis sui tenentis.* Fleta, lib. 6, cap. 1, § 18.

† [Writs of escheat abolished after 1st June, 1835, by stat. 3 & 4 Will. 4, c. 27, ss. 36, 37. See, also, s. 38.]

cases: 1. Where the tenant dies without any relations on the part of any of his ancestors. 2. Where he dies without any relations on the part of those ancestors from whom the estate descended. And 3. Where he dies without any relations of the whole blood. For in all those cases there is no one capable of inherting from him. † [1]

11. Escheats *propter delictum tenentis* arise in consequence of a person being attainted of treason or felony; by which he becomes incapable of inheriting from any of his relations, or of transmitting any thing by heirship.[2] So that if any one dies

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† [But by the recent statute, 3 & 4 Will. 4, c. 106, s. 9, the half-blood are admitted to the inheritance in cases of descents happening after the above period; so that escheat cannot happen on failure of the whole blood, where there are relations of the half-blood capable of inheriting under the provisions of the above statute.]

[1] The three cases here mentioned of escheats arising from default of heirs, are essentially modified by statutes in the United States, as has been already stated in the note at the end of Tit. XXIX. ch. 3.

Excepting the few cases of forfeiture for treason, if any there be, mentioned in the next succeeding note, there are but two cases of escheat recognized in this country; namely, alienage, and dying intestate without heirs. Sewall *v.* Lee, 9 Mass. 363; Hall *v.* Gittings, 2 Har. & J. 112.

In some of the States alienage is no impediment to the right to take and hold lands. See *ante*, Tit. I. § 39, note (2.) And in most, if not all the States, the alienage of an intermediate ancestor is no bar to the deduction of a title by descent. See Tit. XXIX. ch. 3, note, *ad calc.*; Id. ch. 2, § 12, note, and § 20, note. But in those States in which aliens are incapable of holding lands, if the only person answering the description of those entitled to inherit is an alien, the land escheats to the State. But if there are other persons within the description, though remoter in degree, it shall go to them, in preference to the State. See Scott *v.* Cohen, 2 Nott & McC. 293; Jackson *v.* Jackson, 7 Johns. 214.

[2] In the United States, treason and felony do not work any corruption of blood; unless it be treason against those States in which the common law may be supposed to prevail. Thus in *Maryland*, it is declared in the constitution that there *ought* to be no forfeiture, *except* on conviction or attainder of treason or murder. (Decl. Rights, art. 24.)[1] This would seem to recognize the existence and binding force of the common law doctrine of forfeiture in those cases. In *Vermont*, *North Carolina*, and *Ohio*,[2] no mention is made of treason, either in the constitution or statutes; probably on the ground, that the constitution and laws of the United States are sufficient to punish that crime in every case that may occur. See Walker's Introd. p. 151, 458.

In *South Carolina*, it is provided that there shall be no forfeiture of lands for treason of persons subsequently dying, without having been attainted; (Stat. at Large, Vol. II. p. 541,) which leaves it to be inferred that there may be a forfeiture for

[1] [The provision in the new (1851) constitution of Maryland is, "that no conviction shall work corruption of blood or forfeiture of estate." Decl. Rights, art. 24.]

[2] [The new (1851) constitution of Ohio provides, (Decl. Rights, sec. 12,) that "no conviction shall work corruption of blood or forfeiture of estate." And art. 2, sec. 12, names treason as one of the offences for which senators and representatives are not privileged from arrest.]

seised in fee of lands, whose heir at law is attainted, the lands escheat; and where a person attainted died seised in fee of lands, as he cannot have an heir, they will also escheat, unless forfeited; where that happens, they are interrupted in their
399 * passage by the * Crown, in the case of treason, for ever, in that of felony, for a year and a day; after which they escheat to the lord of whom they are held. (*a*) †

12. There is one case in which lands are not liable to escheat; for if an estate held of J. S. be given to a dean and chapter, or to a mayor and commonalty, and to their successors, *and such corporation is dissolved*, the land shall *not escheat* to the lord, but shall *revert to the donor*. Lord Coke says, the reason of this diversity is, that in the case of a body politic, the fee simple is vested in them in their political capacity; therefore, the law annexes a condition to every such gift, that if such body politic be dissolved, the donor shall reënter, for that the cause of the gift faileth. But no such condition is annexed to an estate in fee simple, vested in any man in his natural capacity; except in cases where the donor reserves a tenure, and then the law implies a condition by way of escheat.

13. It is however laid down in 37 Eliz. that where land, rent, &c. is granted to a corporation and their successors, if the cor-

(*a*) 1 Inst. 13 a. See stat. 3 & 4 Will. 4, c. 106, s. 10.

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that crime in other cases. But forfeiture for felony is abolished by statute. (Vol. V. p. 49.)

In the Constitution of the *United States*, and of *Pennsylvania*, *Delaware*, and *Kentucky*, it is declared that there shall be no forfeiture for treason, except during the life of the party. And in the statute of *New York*, forfeiture of estate is abolished, except in cases of outlawry for treason, after conviction. These exceptions exclude forfeitures in every other case.

In the States of *Maine*, *Rhode Island*, *Connecticut*, *New Jersey*, *Ohio*, *Tennessee*, *Indiana*, *Illinois*, *Missouri*, and *Alabama*, all forfeitures of estates for crime are utterly abolished, by express constitutional or statutory provisions.

In *New Hampshire*, *Massachusetts*, *Virginia*, *Georgia*, *Michigan*, *Mississippi*, and *Arkansas*, there are statutes providing specifically for the punishment of treason and felonies; but no mention is made of corruption of blood or forfeiture of estate. And inasmuch as these offences are explicitly legislated upon, and a particular punishment provided in each case, it may be gravely doubted whether the additional common-law punishment of forfeiture of estate ought not to be considered as repealed by implication. See *ante*, Tit. I. § 67, note. Tit. XXIX. ch. 2, § 21, note.

† [But by the statute 54 Geo. 3, c. 145, it is enacted that no attainder for felony, except for high treason, petit treason, and murder, or for abetting the same, shall disinherit any heir, nor prejudice the right or title of any other person than that of the offender during his own life.]

poration grants them over, and is dissolved, they shall not revert to the grantor. (*a*)

14. As the lord's right to an escheat arises solely from the want of a tenant to do the services; it follows, that *whenever there is a tenant, the lord cannot claim the lands by escheat.*[1] Thus, Littleton says, s. 390, if there be lord and tenant, and the tenant be disseised, and the disseisor aliene to another in fee, and the alienee die without issue, and the lord enters, as in his escheat; the disseisee may enter upon the lord, because the lord does not come to the land but by escheat. (*b*)

Mr. Butler has observed on this passage, that when the lord comes to the land by escheat, the law only casts the freehold on him for want of a tenant. The disseisee, notwithstanding the disseisin, continues the rightful tenant; and as by his entry he fills the possession, the lord's title, which was good only while a tenant was wanting, must necessarily be at an end. (*c*)

15. Fitzherbert says, if the tenant be disseised, and afterwards die without heir, it seemeth the lord shall have a writ of escheat, *because the tenant died in the homage. Lord *400 Coke observes, that if the disseisor dies seised, and the disseisee dies without heir, and afterwards the lord accepts rent from the heir or feoffee of the disseisor, this shall bar him of his escheat; because they are in by title. For if the disseisor had made a feoffment in fee, or died seised, and after the disseisee died without heir, there would be no escheat; because the lord had a tenant in by title. (*d*)

16. It is, however, laid down by Fitzherbert, that where a man had a title to a writ of escheat, if he accepted homage of the tenant, he should not have the writ against him, because he had accepted him as his tenant. So if he accepted fealty of him. But receipt of rent would not bar a writ of escheat. (*e*)

17. It follows from the principles stated in s. 14, that any *actual alienation* by the tenant will bar the lord of his escheat.

(*a*) Southwell *v.* Wade, 2 Roll. Ab. 65. Poph. 91. Godb. 211.
(*b*) Gilb. Ten. 25.
(*c*) 1 Inst. 240 a, n.
(*d*) F. N. B. 144. 1 Inst. 268 a.
(*e*) F. N. B. 144.

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[1] "Confiscations" being "repugnant to the genius of a free country," the doctrine of escheats is in all cases to be restricted to the case of a vacant possession. Burgess *v.* Wheate, 1 Eden, 177, 253.

But a *mere contract* for the sale of lands will not bar the lord, as will be shown hereafter.

18. If an infant makes a feoffment in person, and dies without heir, the land shall not escheat; otherwise, if it was made by letter of attorney. For the lord by escheat being only a privy in law, cannot take advantage of infancy; because he is a stranger to the infant. It is the same of an idiot or lunatic. (*a*)

19. *A devise*, though it only takes effect at the moment of the testator's death, will *prevent an escheat.* And, in a note of Lord Nottingham's to the first Institute, it is said, that where a woman, seised of lands in London, devised them to be sold by her executors, and died without an heir, the devise prevented the escheat, which the King pretended to have; and the executors might enter and sell; therefore more than a bare authority passed. Yet in 1651, on evidence at the bar, this case being stated, Lord C. J. Rolle doubted of the opinion; because, he said, it was only a descent according to the words of Littleton; and it appeared to him, that when lands were devised to be sold by executors, there no interest passed. (*b*)

20. A man devised his estate to his wife for life; and that, after her death, it should be sold by A, and the money to be divided amongst the plaintiffs. The testator died without heir; before any sale A died also. It not appearing that the land was held of any mesne lord, the plaintiffs brought their bill against the Attorney-General, praying to have the will established, and *to hold and enjoy against the Crown, or to have the lands sold pursuant to the will. (*c*)

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Lord Hardwicke said, if he could relieve the plaintiffs, he would. He thought, at first, this was a bill brought to prove a will, by which the lands themselves were devised to somebody; if so, he would have thought such a bill proper; would have declared the will to be well proved; and decreed the devisee to sell, without any occasion of making a decree against the Crown. But here was no devise of the land, only a power to sell. If A had lived, as he had only a power, and no interest in himself, none could arise from him, but from the testator; and

(*a*) 4 Rep. 124 a. 8 Rep. 44 a. Tit. 32, c. 4.

(*b*) 1 Inst. 236, n. 1 Roll. R. 214. 3 Bulst. 43. Godb. 411. (Taylor *v.* Benham, 5 How. U. S. Rep. 233.)

(*c*) Reve *v.* Att.-Gen. MS. R. 2 Atk. 223.

he, as well as the testator, being dead, there was none to make a decree against. If any thing of the sort that was prayed for could be done, it must be in the Court of Exchequer, which was a court of revenue, and the proceedings in a petition of right, though called a petition, are as much a legal proceeding as by original writ.

Suppose this land had been seised and put in charge,—could he make any decree relating to it?—None. But the Court of Exchequer could. He could neither decree the Crown to sell, nor the plaintiff to hold and enjoy against the Crown. The bill was dismissed.

21. All lands and tenements held in socage, whether of the King or of a subject, are *liable to escheat.* But it follows, from the nature of an escheat, that it must be of the entire fee; therefore, an estate tail does not escheat, but goes to the person in reversion, unless the tenant in tail has also the reversion in fee in him; for in that case the whole estate will escheat. (*a*) [1]

22. No species of real property is, however, subject to escheat, but what *lies in tenure;* for escheat is a consequence and fruit of tenure. Thus, if a person seised in fee of a rent charge, right * of common, free warren, or any kind of inheritance *402 that is not holden, was attainted of felony, the King should have the profits of them during the life of such person; but after his decease, as they could not descend to his heirs, on account of the corruption of his blood, they became extinct. For in escheats on account of petit treason or felony, a tenure is requisite, as well in the case of the King as in that of a subject. (*b*)

23. *An use* was not liable to escheat, because it did not lie in tenure; and as trusts are now what uses were before the statute 27 Hen. VIII. it was determined, in the following case, after great consideration, that *a trust estate* is not liable to escheat; but that where a *cestui que trust* dies without heirs, the trustee shall retain the land for his own benefit (*c*)

24. Elizabeth Gunning, being seised of certain lands in fee simple, *ex parte paternâ*, married Nicholas Harding; but previous thereto, in 1695, a settlement was made of her estate, to the use

(*a*) F. N. B. 144. (*b*) 3 Inst. 21. Hard. 496. (*c*) Tit. 12, c. 1.

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[1] A remainder in fee, dependent on an estate for life, may escheat before the death of the tenant for life. The People *v.* Conklin, 2 Hill, N. Y. Rep. 67.

of Nicholas Harding for life, remainder to Elizabeth Gunning for life, remainder to trustees to preserve contingent remainders, remainder to their first and other sons in tail male, remainder to the right heirs of Elizabeth Gunning. (*a*)

There being no issue male of the marriage, an indenture was made in 1718, between Harding and his wife of the one part, and Sir Francis Page and R. Simmons of the other part, reciting the settlement of 1695, and covenanting to levy a fine, to assure the premises to the use of the daughters of the marriage, as tenants in common; and in default of such issue, to Sir Francis Page and Simmons, and their heirs, in trust for the said Elizabeth Harding, her heirs and assigns; to the intent that she might, at any time, during her life, without her husband's concurrence, dispose of the reversion to such uses as she should, by will, or other writing, appoint; and a fine was accordingly levied.

There was no daughter of the marriage. The wife survived her husband; but died without making any appointment, and without heirs on the part of her father. Burgess, the plaintiff, was her heir on the part of the mother.

After the death of Elizabeth Harding, Sir Francis Page, who survived Simmons, got into possession; and, in July, 1739, Burgess filed a bill against him, praying, that if he had any legal interest in the premises, he should be compelled to convey it to Burgess. Sir Francis Page, by his answer, insisted that he was lawfully seised of the inheritance of the estate, and entitled to the rents and profits.

The Attorney-General, on behalf of the Crown, filed an information in Chancery, insisting that Sir Francis Page, by the deed of 1718, had no beneficial interest in the estate, in his own right, but was a mere trustee for the benefit of Mrs. Harding, or her appointee or heir; and in default of such appointment or heir, that he was a trustee for the benefit of his Majesty, who stood in the place of such heir. That the premises were escheated, and the representatives of Sir Francis Page ought to convey to the use of his Majesty.

The case was argued before Lord Keeper Henley, assisted by Lord Mansfield and Sir Thomas Clarke, Master of the Rolls.

Sir Thomas Clarke said, the great question was, whether the Crown had a right to a conveyance of the legal estate from Mrs.

(*a*) Burgess *v.* Wheate, 1 Black. R. 123. 1 Eden, 177.

Harding's trustee, as an equitable escheat, by the death of Mrs. Harding without heirs on the part of the father. He should consider the right of escheat in three lights:—1. In what situation it stood in respect to a conveyance at common law, before the invention of uses. 2. In what situation it stood with respect to a conveyance to uses, before the Statute of Uses was made. 3. How it stood since that statute, and now with regard to trusts. The result and application of the whole would decide the question, how far the Crown was or was not entitled in equity to a conveyance from the trustee.

1. An escheat was in its nature feodal; a feud was the right which the tenant had to enjoy the lands, rendering to the lord the services reserved by the contract. On the other hand, an interest remained in the lord, after the grant made, called a seignory, consisting of a right to the services of the tenant, and to the land itself, on the expiration of the grant, as a reversion; which was afterwards called an escheat. As the grant *was more or less extensive, the reversion was more or *404 less remote; for feuds were sometimes temporary, sometimes hereditary; and a temporay one ended on the grantee's death.

Sir H. Spelman only took notice of hereditary feuds, nor did our laws; and though it might seem a paradox to modern ears, a feoffment to A and his heirs did not pass a fee simple originally, in the sense in which it was now used; but only an estate to be enjoyed *ut merum beneficium*, without power of alienation, in prejudice of the heir of the lord; the heirs took it successively as an usufructuary interest; and in default of heirs, the land escheated, or strictly speaking, reverted. If there was an heir, and by legal impediment he could not take, the land escheated. When a power of alienation was introduced, first with the license of the lord, and afterwards without such license, the right of escheat became more remote; and when a power of charging or encumbering the feud was given to the tenant, the lord took the escheat subject to the incumbrance. This power was more prejudicial to the right of escheat than the power of alienation; for that only changed the lord's chance, but the incumbrances defeated the right of escheat as far as they went. (*a*)

(*a*) Bract. 23 a. 46 Edw. 3, pl. 4. Bro. Ab. tit. Escheat, 2. Bract. 382 a.

2. Upon the introduction of uses, two distinct kinds of property might be acquired in land; the legal estate, and the use. *Cestui que use* was no longer tenant at law, nor was the land subject to his incumbrances. But though the land was not liable at law on account of the *cestui que use*, yet it was still liable on account of the feoffee to uses. This being found extremely inconvenient, a variety of statutes were made to restore the fruits of the tenure to the lord, against the *cestui que use*, as relief, wardship, &c.; but no statute was made to restore the loss of the escheat; which, as Sir H. Spelman observes, is not only the fruit of the tenure, but the very tree itself. (*a*)

3. Thus stood the law till the Statute of Uses united the use and the legal estate; but as the courts of law determined that there were some uses to which the statute did not extend, they were called trusts, and succeeded to uses, *aliusque et idem nascitur*. The Court of Chancery having taken cognizance of trusts, adopted, in the construction of them, all those rules by which uses had been governed before the statute. The case of curtesy was the only exception; and that seemed to have
405* *prevailed unaccountably, and against the opinion of the Judges themselves.

Before the Statute of Uses, if a *cestui que use* was attainted of treason or felony, the lord could not have the land, but the feoffee might retain it to his own use. 5 Edw. IV. pl. 18, fo. 7 *b*, was an authority in point against the lord's claim, and questions who should have. If the lord was at law entitled to an escheat on death without heirs, or attainder of feoffee to uses, and not on death, &c., of *cestui que use*, it strengthened the authority of the case. If it had been determined otherwise in favor of the lord, it would have given him a double chance for his escheat.

Brook, pl. 34, agrees, the lord shall not have it, nor the heir, by reason of corruption of blood; and that feoffee shall retain it to his own use. And though this was introduced by an *ideo videtur*, in a modest manner, yet many of his opinions were so introduced, and had generally been thought of great authority. From this it was clear that, if Mrs. Harding had been *cestui que use*, and attainted of treason or felony, the lord would not be

(*a*) Bro. Uses, pl. 10. *Vide* tit. 11, c. 2.

entitled to escheat; and if trusts in equity were analogous to uses at law, and he thought they were, neither would the Crown be entitled in the case of a trust in equity. (*a*)

Sir G. Sand's case was in point; and that and the case in 5 Edw. IV. mutually strengthened each other. (*b*)

It had been said, if the legal estate had escheated to the Crown for want of an heir to the trustee, it would in equity have been liable to the trust; but this position was not proved by any authority. And if it were true, why ought the lord to have a reciprocal equity on the death of the *cestui que trust*, without heirs? Upon the whole, his opinion was, (to use the words of Sir Joseph Jekyll,) that the title of the trustee should not have been set up, but as it was set up, it appeared a plain and subsisting one. The law was clear; and courts of equity ought to follow it in their judgment concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue.

Lord Mansfield said, he would follow the method used at the bar, under the four following heads: 1. The nature of trusts of land, and the rules that governed them. 2. The nature of that right by which the King claimed in this case. 3. Whether, if the trustee had died without heir, the King must not in that *case have taken the land, in a court of equity, subject to the trust. And, 4. Apply the result of the inquiry, as between the King and the trustee, to the particular point immediately in judgment. *406

1. As to the nature of trusts of land, and the rules by which they were governed. By an inquiry into the nature of an use or trust of lands, no more was or could be meant than to find out, historically, on what principles courts of equity, before the statute 27 Hen. VIII., interfered in modifying or giving relief in rights or interests in lands, which could not be come at but by suing a *subpœna;* and what courts of equity now did in modifying, directing, and giving relief in cases of trusts, where there was no other remedy but by bill. Whoever showed that the relief then given was more extensive; that it was considered by different or opposite rules; that the right was considered in different or opposite lights; would show the difference and con-

(*a*) Bro. Abr. tit. Feoff. al. Use, pl. 34. (*b*) Att.-Gen. *v.* Sands, tit. 12, s. 2, § 28.

trast between uses and trusts. The opposition was not from any metaphysical difference in the essence of the things themselves; an use and a trust might essentially be looked upon as two names for the same thing; but the opposition consisted in the difference of the practice of the Court of Chancery. If uses before the statute 27 Hen. VIII. were considered as a permancy of the profits, as a personal confidence, as a *chose in action*, and now trusts were considered as real estates, as the real ownership of the land; so far they might be said to differ from the old uses; though the change might not be so much in the nature of the thing, as in the system of law by which it was regulated. The old law of uses did not conclude trusts now; where the practice was founded on the same reason and grounds, it was still followed; but its positive authority did not bind, where the reason was defective; more especially, that part of the old law of uses which did not allow any relief to be given for or against any estates in the *post*, did not now bind by its authority in the case of trusts.

Trusts, from the nature of the thing, might be left to the honor and faith of the trustee; in that case they were not the objects of law, otherwise than as they might be fraudulent and void in respect to third persons; or a court of justice might take cognizance, or compel the execution of them; in that case, trusts only retained the name in substantial ownership, the dis-
407* position *in trust became the mere form of a legal conveyance. Trusts in England, under the name of uses, began, as they did in Rome, under no other security than the trustee's faith; they were founded in fraud to avoid the statutes of mortmain. Trusts were not on a true foundation till Lord Nottingham held the great seal; by steadily pursuing trusts from plain principles, and by some assistance from the Legislature, a noble, rational, and uniform system of law had been raised; trusts were made to answer the exigencies of families, and all other purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Henry VIII. meant to avoid. The *forum* where they were adjudged was the only difference between trusts and legal estates; trusts in the Court of Chancery were considered, as between the *cestui que trust* and trustee, as the ownership and as legal estates; whatever would be the rule at

law, if it was a legal estate, was applied in equity to a trust estate. Trust estates were liable to curtesy; the case of dower was the only exception; and not in law or reason, but because a wrong determination had misled in too many instances to be altered and set right; and if an alteration was to be introduced, the best way to set it right would be to allow the wife dower of a trust estate.

In the eye of the Court of Chancery, Lord Hardwicke thought the equity of redemption was the fee simple of the land; that it would descend, might be granted, devised, entailed; and that equitable entail might be barred by a common recovery. This proved, it was considered in Chancery as an estate whereof there might be a seisin, for without such a seisin a devise of a trust could not be good. (*a*)

The allowing curtesy of a trust was founded on the maxim that equity follows the law; which was a safe as well as a fixed principle, for it made the substantial rules of property certain and uniform, be the mode of following it what it would. It followed, from the great authority of this determination, on clear law and reason, that the *cestui que trust* was in the consideration of Chancery, actually and absolutely seised of the freehold.

To conclude this head, an use was originally understood to be merely an agreement, by which the trustee, and all claiming in privity under him, were personally liable to the *cestui que trust*, and all claiming under him, in like privity. Nobody in the *post* * was entitled under, or bound by the agreement; *408 but now the trust in Chancery was the same as the land, and the trustee was therefore considered merely as an instrument of conveyance; he was in no event to take a benefit. The trust must be co-extensive with the legal estate; and where it was not declared, it resulted by necessary implication, because the trustee was excluded; except where the trust was destroyed by a conveyance to a purchaser, without notice, for a valuable consideration.

The trustee could transmit no benefit; his duty was to hold for all those who would have been entitled, if the limitation had not been by way of trust. There was no distinction now

(*a*) Casburne *v.* Inglis, tit. 15 c, s. 12.

between those in the *per* and the *post*, except in the case of dower, which was not founded on reason, but on practice.

As the trust was the land in Chancery, so the declaration of trust was the disposition of the land; and therefore an essential omission in the legal disposition should not destroy the trust.

The grounds why the lord by escheat neither took, nor was subject to, an use, did not now subsist. The principles upon which the question must now be argued, had no relation to it, whichever way it ought to be determined; or, rather, none of those principles were made or could ever be considered in the law of uses; for the Court of Chancery never interposed in cases where the claim was in the *post*, and for that reason it was taken for granted, in Edward IVth's time, that the lord should not have it.

2. This brought him to consider the nature of the right by escheat.

It had been truly said that, on the first introduction of the feudal law, this right was a strict reversion; when the grant determined by failure of heirs, the land returned, as it did upon the expiration of any smaller interest. It was not a trust; but the extinction of the tenure; as Mr. Justice Wright said, it was the fee returned.

This distinction held equally, whether the investiture was to special or general heirs; for originally the tenant could not aliene in any case without the lord's concurrence. The reversion took effect in possession for want of an heir, unless the lord had done or permitted what in point of law amounted to a consent
409 * * to a new investiture, or change of his vassal; this was the meaning of what was said in the books, that nothing escheated, where the tenant was in by title.

As soon as a liberty of alienation was allowed without the lord's consent, this right became a caducary succession, and the lord took as *ultimus hæres;* but the resemblance of the lord's right by escheat to that of the heir by descent, did not hold throughout; and therefore Sir Edward Coke, with great accuracy, considered the lord by escheat as assignee in law. He took no possibility or condition, or right of action, which could not be granted. He could not elect to avoid voidable acts, as a

feoffment of an infant, with livery; but every right preserved to the heirs, which could be granted, went to the lord by escheat, as a rent reserved to the tenant and his heirs. (*a*)

In the case of Thruxton *v.* Attorney-General, the benefit of a trust term was decreed to the King, taking by escheat, because it was to go with the inheritance, by the express limitation of the parties. (*b*)

3. Whether, failing heirs of the trustee, the King must not in this case have taken the estate in a court of equity, subject to the trust.

This seemed to be a very material consideration; for if the King was not to be subject to the trust, there was no color that he should claim the trust by escheat. That land escheated should be subject to the trust, appeared to him to be most consistent with the King's right, whether the escheat were considered as a reversion, as it once was, or as a caducary succession *ab intestato*, as it then substantially was. The King could not claim by escheat, contrary to the terms or conditions which the tenant held under; from which two things followed, 1st. That there was equity against the King; and, 2dly, That the lord was bound as much, in a court of equity, by the equitable terms of his investiture, as he was in a court of law by the legal terms. Taking the estate as a caducary possession, the lord could only take *ab intestato*, absolutely; so far as the tenant had not disposed of the estate he could take, and no further. The tenant's power of disposing was absolute, without the lord's privity, without any determined form of conveyance. The trustee had, by his declaration of trust in 1718, made a valid conveyance of his trust in equity; and therefore a court of equity could not, * he apprehended, suffer the land to go as undisposed *410 of by the tenant; because in the consideration of Chancery there was a valid disposition made by him; but even at law, the escheat would not be free from the trust. The Statute of Frauds made a trust estate assets in the hands of the *cestui que trust;* consequently, for that purpose, the estate descended to the heir.

In 18 Cha. II., before trusts were put on the rational footing they were now, the apprehension of the Judges was, that the

(*a*) 1 Inst. 215.

(*b*) *Ante*, Vol. I. * 426, (1 Vern. 340.)

lord by escheat, ought to be subject to the trust. Lord Bridgman thought so in 1702. Sir John Trevor certainly knew there could be no escheat of an use. If it was not to be subject to the trust, he thought the inconvenience would be very great; and where they were not tied down by any erroneous opinions, which had prevailed so far in practice that property would be shook by an alteration of them, arguments of convenience and inconvenience were always to be taken into consideration. Almost all the great estates in England were now limited in trust; the trustees were men of business, probably concerned for the family, and at a little distance of time, their pedigrees were not to be traced; and if the surviving trustee was to die without heir, it would be thought hard if the estate should be lost. But he rested upon this,—it seemed to be a contradiction in terms that he, who had no claim but *ab intestato*, where the owner had not disposed of his property, should take contrary to, and in prejudice of his dispositions.

An escheat was now as much a title under the former owner, in consequence of his former seisin, as that of the heir. Why else should the lord be deemed the assignee or heir of the tenant? He thought the lord might be considered as much his heir as the heir by blood, and was as much liable to all his disposition.

4. If what he had said was right, little was left for him to say on this head. If the lord took an escheat as heir or assignee in law, then the King was within the express declaration of trust, which was, to Elizabeth Harding, her heirs and assigns. And upon the whole, he thought the King was entitled to a decree.

The Lord Keeper said, the question on the information was, whether *cestui que trust* dying without heirs, the trust was
411 * *escheated to the Crown, so that the lands might be recovered in a court of equity by the Crown; or whether the trustee should hold them for his own benefit. He should consider,—1st. The right of lords to escheat at law. 2dly. Whether they had received a different modification in a court of equity. 3dly. The arguments used in support of the information. And, from the whole, draw a conclusion that the Crown had no equity.

1. The legal right of escheat arose from the law of enfeoff-

ment to the tenant and his heirs; and then it returned to the lord, if the tenant died without heirs. The extension of the feoffment from the person of the tenant to the heirs special of his body, and then to his heirs and assigns, was accurately traced in a Treatise of Tenures by a learned hand. This reduced the condition of the reversion to this single event, *ob defectum tenentis de jure.* The lord became entitled to the land by escheat, in lieu of his services. The books were uniform, that, in the case only of the tenant's dying without heir, the escheat took place; as long as the tenant, or his heir, or any other person, by his implied assent, continued in possession by title, that prevented the escheat. This showed that, where there was a tenant actually seised, though he had no right to the tenements, and though the person who had right died without heirs, yet the escheat was prevented; for if the lord had a tenant to perform the services, the land could not revert in demesne. (*a*)

Upon these cases, he would observe that the lord's consent had nothing to do with establishing the right of the tenant's being duly seised; because in every one of these cases, they all came in without the lord's consent; unless it could be said that the lord was a virtual assenter, as well to the disseisins, as to the legal conveyances; and if that were so, it would operate to the establishing the right of the trustee in Chancery, who would say he was entitled under a conveyance in law, by the very consent of the lord, which was a stronger case than a disseisin. From these cases and authorities, it must be allowed to be settled that the law did not regard the tenant's want of title, as giving the lord a right to the escheat.

2. The next consideration was, whether a court of equity could consider it in a different light. Now, when the tenant did not die seised, and a proper legal tenant by title continued, could the Court of Chancery say to the lord, your seigniory is extinguished; *and to the tenant, your tenancy is so too; *412 though both were legal rights, then subsisting at law?

In consideration of uses, with regard to escheats, equity had proceeded on the same principle as law, where there was a tenant of the land, who performed the services; and he did not find the Court had any regard to the *merum jus* of the tenant. Now,

(*a*) 1 Roll. Abr. 816. 1 Inst. 268 b.

the reason why there was no escheat on the death of *cestui que use*, in equity, seemed to be this, (and it was a reason equally applicable to uses and trusts,) that the Court had nothing to issue a *subpœna* upon, no equity, nothing to decree upon; and every person must bring an equity with him for the Court to found its jurisdiction. It seemed to him, he could have no equity in the case of an use, or as owner of the trust, for this plain reason; an use before the statute could not be extended further than the interest in the estate, which the creator of the use could have enjoyed. As if the creator of the use had a fee simple in the land, he could take back no more interest in the use, either declared or resulting, than he had in the land. If he made a feoffment, and declared no uses, it resulted to him in fee, which was to him, his heirs, and assigns. The consequence was, that the moment he died without heirs or assigns, there was no use remaining. How, then, could you come to Chancery for a *subpœna* (whether he took back the same or a different use) to execute an use or trust which was absolutely extinct?

That seemed to him the plain and substantial reason why, in the present case, whether it was an use or a trust, there was no basis on which to found a *subpœna*. The Lord Chief Justice's system was very great and noble, and very equitably intentioned; such a system as he should readily lay hold of upon every occasion, if he thought he could do it consistently with the rules of law. Where a person passed the estate without consideration, there, in modern language, an use resulted; because it was unequitable that a man should have an interest in the estate, when he had paid no consideration for it. But where a person was not party to the deed, nor privy to the estate, he did not see how any thing could result for his benefit. That this was the notion in respect to an use appeared from authorities. The law was, that the lord could not have the escheat of an use; so was 5 Edward IV. for he took that to be the report of a case. Then it had all the authority the Year Books carried with them; and
413* *this had been adopted by all the writers since. Bacon, 79, did not question the authority of that case; he gave a reason of his own, which he substituted as a better than that in the books; that there was a tenant in by title, which was a strong reason in law; but he did not mention that as a reason,

with regard to the *subpœna*. It was not a conclusive reason that the lord should not have a *subpœna*, because there was a person in possession; he should have it for that reason, if that person was liable to him in equity. Therefore he gave a better reason; because, says he, it never was his intent to advance the lord, but his own blood. Therefore that was the reason; it would not be within the intention of that trust, that any beside the blood of the covenantor should take. Nobody could imagine the tenant intended to provide a trust, to answer the lord's escheat. Mrs. Harding never thought of escheat, he supposed; but had it been suggested to her, if she died without heirs that could possibly take her estate, would she rather have the friend she had chosen to make her trustee have it, or that it should go to the King? She must have been a subject of more zeal than he could suggest, if she had said she would give it to the King. (*a*)

As he was stating the law of escheats with regard to uses and trusts, he would take notice of an objection that seemed equally to affect the opinions of lawyers, with regard to the doctrine of uses and trusts. That was the dilemma which was urged at the bar, as the basis of the equity in this case, though he did not think it a necessary dilemma, viz., that the lord must have the estate by escheat, either on the death of the *cestui que trust* without heirs, or of the trustee without heirs, discharged of the trust; but if he could not have it while the trustee lived, while there was a tenant, it would be monstrous that the *cestui que trust* should be prejudiced by the putting the estate in the trustee's hands for the benefit of the family. One part of this was a dangerous conclusion, the other was not; his answer was, that if the law were so, that the lord should in that case take it discharged of the trust, he must suppose it no injury or absurdity at all; *volenti non fit injuria*. The creator of the trust determines to take the convenience of the trust, with its inconvenience. It was most certain every man who created a trust, put his estate in the power of his trustee; if the trustee sold it for a valuable consideration, without notice, no Court could relieve *the owner from this misfortune, it was the result *414 of his own act; and yet that was as shocking a perfidy in the trustee as could be; but the Court could not interpose, as it

(*a*) Bac. Read. 12, edit. 1785.

would affect the rights of others, of third persons. But he did not think this was at all a necessary dilemma. The lord might not be entitled on the death of *cestui que trust* without heir, because there was no equity, for he had a tenant, as he had before. But possibly there might be an equity the other way against the lord; for if the trustee died without heir, and the lord had the estate, the Court of Chancery might say, You shall hold to compensate yourself for your rent and services, but we will embrace the rest for the *cestui que trust.*

A difference was attempted to be made between uses and trusts; but, by comparing the definitions of the two, it would appear they were precisely the same. It was said the difference consisted in this, that equity had shaped them much more into real estates than before, when they were uses; as now there was tenancy by the curtesy of a trust, it might be entailed; and the entail might be barred by a common recovery. But why? Not from any new essence they had obtained, but from carrying the principle further. *Quia equitas sequitur legem:* for as between the trustee and *cestui que trust*, the Court of Chancery had jurisdiction; and he thought they should have equally extended the rules and principles of uses, as well as those of trusts.

That it would be a bold stroke to say, Chancery considered trusts as a mere nullity; and that they were to be treated in the same manner as if they continued in the seisin of the creator of them, or of the person for whom they were made. Rules of property were not to be questioned, even by the Judges; while the people continued satisfied, and acquiesced in them, none but the Legislature could alter them. His objection to the claim in the information was, not that it was to have a trust executed, as if it were land: but it was to claim the execution of a trust that did not exist. If there was a trust, he should consider it merely as an estate, and determine accordingly: but the creation of a trust never could affect the right of a third person.

He could assign but one reason why that distinction between tenancy by the curtesy and dower had prevailed, and it was applicable to the reason of this case. He had heard the
415* House of *Lords were startled at the distinction: they were told the opinion of conveyancers was so; and that, if

it was altered, it might load purchasers with dower, who thought they had purchased free from it; and the Lords would not reverse the judgment, because they would not let it affect the right of a third person. It appeared that at law there could be no escheat, while there was a tenant *de jure;* in equity there could be none while trusts were called uses; and a trust and an use were exactly the same. How then could he say the lord should lose his escheat, when any man, for his own convenience, put his estate in trust. It seemed, if he were to do so, that he would *give* law and equity, and not *pronounce upon* law and equity.

Two centuries had passed since uses and trusts had been admitted, and he could not find a *dictum* that the Crown should have an escheat of a trust.

The judgment in Sir George Sands's case being an authority in point, great efforts were made to weaken its validity. But Lord Hale had determined on great principles of law; and he could not help remarking, that neither the bar nor the bench were ever frightened at the ill consequences which had been mentioned. The information on the part of the Crown was dismissed. (*a*)

25. In a subsequent case Lord Thurlow said, Burgess *v.* Wheate was determined upon divided opinions, and which opinions continued to be divided, of very learned men. The argument of the defect of a tenant seemed to be a scanty one. Whether that case was such an one as bound only when it occurred *speciatim*, or afforded a general principle, was a nice question. (*b*)

26. An *equity of redemption* is considered as not liable to escheat; and in the case of Burgess *v.* Wheate, the Lord Keeper said, "If a mortgagor die without heir,—shall the mortgagee hold the land free? I answer, Shall it escheat to the Crown? No, because in that case the lord has a tenant to do his services; and that is the whole he is entitled to in law and equity. What the justice might be between the mortgagee and executor, I shall not trouble myself about. I think the Crown has not an equity on which to sue a *subpœna.*" (*c*)

27. Where *money is directed to be laid out in the purchase of*

(*a*) Tit. 18, ch. 2, § 28.
(*b*) Middleton *v.* Spicer, 1 Bro. Rep. 201. Hargrave, Juris. Exer. vol. i. 388.
(*c*) 1 Black. R. 184.

land, but the quality of real estate is not imperatively and
416* *definitively fixed upon it by the instrument; and it remains, *ad arbitrium*, whether it is to be considered as land or money; it has been held by the Court of Chancery that, on failure of heirs, the Crown has no equity against the next of kin to have it laid out in real estate, in order to claim the escheat. (*a*)

28. It has been stated that all the lands in England are now held in socage, either immediately of the King, or mediately of some private person, by fealty and other services which are preserved to the lord by the statute 12 Cha. II. *To the feudal lord* therefore *all lands escheated belong;* so that where freehold lands are held in fee of a manor, the escheat is to the person who is lord of that manor. In the case of a seigniory in gross, the escheat is to the person entitled to that seigniory; and where it cannot be ascertained of whom freehold lands are mediately held, then the King, as the great and chief lord, shall have them by escheat; for to him fealty belongs, and of him they are certainly holden by presumption of law, and without necessity of proof. (*b*)

29. The lord by escheat *may distrain for rent* due to the last tenant; as if there be lord and tenant, and the tenant makes a lease for life, rendering rent, if he afterwards dies without an heir, whereby the reversion comes to the lord, by way of escheat, he may distrain for the rent, because it is incident to the reversion. But he cannot take advantage of a *condition of reëntry*, because he is not heir to the lessor. (*c*)

30. Where the inheritance escheats, and there is an *outstanding term*, which is *attendant* on the inheritance, the lord by escheat will be entitled to such term.

31. A person seised in fee limited a term for one hundred years to trustees, in trust to attend the inheritance; he afterwards died without an heir, being a bastard. The question was, whether this term should go to the King with the inheritance. It was determined that the King was entitled to the term; for he was not in, barely in the *post*, but in the *per* also; and

(*a*) Walker *v.* Denne, 2 Ves. Jun. 170.
(*b*) Dissert. c. 8, s. 38. 12 East, 109, 110. May *v.* Street, Cro. Eliz. 120.
(*c*) 1 Inst. 215 b.

the *term for years went, with the inheritance, by the *417 express limitation of the party. (*a*)

32. The lord by escheat is *entitled to all the charters* concerning the lands escheated. And it is said in Brook's Ab. that if a tenant is attainted of felony, the lord shall have his lands by escheat, and also the charters; though the charters are not forfeited. (*b*)

33. The lord who acquires the land by escheat is *liable to all the incumbrances of the last tenant.*[1] Thus, if a person dies without heirs, having granted a rent, the lord by escheat will hold the lands subject to such rent. So if he dies leaving a wife, she will be entitled to dower; and in the case of a woman, her husband will be entitled to curtesy. For as the tenant has the power to defeat the lord's right to an escheat by any mode of alienation, he must consequently have every inferior power. (*c*)

34. The reason that the lord by escheat is subject to incumbrances is, because they are *annexed to the possession* of the land, *without respect to any privity;* but the lord who comes in by escheat, is not subject to any incumbrances *annexed to the privity of estate;* for he comes in in the *post*, and therefore was *not bound to execute an use*, his title being paramount, namely, by force of the condition in law tacitly annexed to the land, at the time of the creation of the seigniory, which he had to his own use. (*d*)

35. It follows, by a strict analogy from the case of an use, that the lord by escheat is *not bound to execute a trust.* In the *case of the Crown it is laid down in all the books *418

(*a*) Thruxton *v.* Att.-Gen. 1 Vern. 340.
(*b*) Bro. Abr. tit. Charters, 89.
(*c*) 7 Rep. 7 b.
(*d*) Tit. 11, c. 2.

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[1] As the State, in this country, succeeds to the rights of the Crown, and not to those of the mesne lord, the rule that escheated lands may be held by the sovereign, free of *all* liens and incumbrances, is quite foreign from the spirit of our laws. On the contrary, it is expressly provided in the statutes of several States, that escheated lands shall be subject to the claims of the creditors of the intestate, after exhausting the personalty, and to all other legal liens, demands, and incumbrances. See *Delaware*, Rev. St. 1829, p. 198–200; *Maryland*, Stat. 1785, ch. 78; 1794, ch. 60, § 6; 1799, ch. 79, § 7; 1 Dorsey's Laws, p. 228, 317, 420; *Virginia*, Tate's Dig. p. 329; *North Carolina*, Rev. St. 1837, Vol. I. p. 365; *Georgia*, Rev. St. 1845, p. 490–492; *Indiana*, Rev. St. 1843, p. 542, § 319, 320. [When lands escheat to the State, the title vests in the State instanter on the death of the owner, so that the Orphans' Court has not the power to order them to be sold for the payment of the debts of such former owner. Den *v.* O'Hanlon, 1 New Jersey, 582.]

that the King could not be seised to an use; from which it appears to follow that he cannot be a trustee, except in particular cases. And it appears from a modern statute, 39 & 40 Geo. III. c. 88, § 12, to have been understood that where the King acquired an estate by escheat, he was *not compellable* to execute any trust, to which such estate was liable,[1] for by that statute the Crown is enabled to direct the execution of any trust to which lands escheated are liable, and to make any grants of such lands. (*a*)

[36. In Pawlett *v.* Attorney-General, a bill was brought to redeem a mortgage which had vested in the King by the attainder of the heir at law of the mortgagee. Sir Matthew Hale was of opinion that the King could not in equity be compelled to reconvey; but that an *amoveas manum* only lay in such case, and that was all which could be done in case a trustee forfeited his estate. (*b*)

37. In Reeve *v.* Attorney-General, an estate, escheated to the

(*a*) Tit. 11, c. 2, § 16. Tit. 12, c. 1, § 83. Tit. 34.
(*b*) Hard. 467. (King *v.* Holland, Aleyn, 14. Hard. 486.)

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[1] It is expressly declared by a statute of *New York*, that "all escheated lands when held by the State, or its grantees, shall be subject to the same trusts, incumbrances, charges, rents, and services, to which they would have been subject had they descended;" and the Court of Chancery is empowered to direct the Attorney-General to convey them accordingly. Rev. St. Vol. II. p. 2, § 2, 3d ed. This provision, Chancellor Kent remarks, was intended to guard against *a very inequitable rule* of the common law, that if the King took lands by escheat, he was not subject to the trusts to which the escheated lands were previously liable; and he refers to the English statutes of Geo. III. as calculated to check the operation of such *an unreasonable principle.* It is further checked in England, if not entirely prevented, by the statutes of 11 Geo. IV. and 1 Will. IV. c. 60, and 4 and 5 Will. IV. c. 23, and 1 and 2 Vict. c. 69. See 1 Sand. on Uses and Trusts, p. 302, note 8, where the law on this subject is stated with great clearness and discrimination. But as the feudal principle on which this rule was founded, had never any general application in this country, and since the Revolution it has passed into oblivion everywhere, it may well be doubted whether the rule would now be recognized in any of the United States, even if there were no statute relating to the subject. The difficulty of compelling the execution of the trust, after the lands have escheated, in those States which have no process provided where remedy is sought against the State itself, is rather nominal than real; inasmuch as a remedy would always be given, of course, on petition to the legislature. See Willis on Trustees, c. 2; 1 Sand. on Uses and Trusts, p. 389; Lomax, Dig. p. 607, 608; Matthews *v.* Ward, 10 G. & J. 443; 5 Rawle, 112, 113. In *Massachusetts,* upon an information to recover possession of escheated lands, *any* person, claiming *any estate or interest* in the lands, may set up his title; which in terms includes the interest of a *cestui que trust.* Rev. Stat. ch. 108, § 8, 9.

Crown, was charged in equity by the will of the person dying, and for want of whose heir the estate escheated, with several legacies. The legatees filed their bill to have the estate sold, and the question was, whether an estate escheated to the Crown, can be affected by a trust. The bill was dismissed. The above case was cited in Penn *v.* Lord Baltimore, and it is reported that Lord Hardwicke said that where the Crown was a trustee, the Court had no jurisdiction to decree a conveyance, but they must go to a petition of right.] (*a*)

38. With respect to private persons, Carter reports Lord Bridgeman to have said, [in Geary *v.* Bearcroft,] that where a man conveys lands in trust, and the trustee is attainted of felony, the lands shall be forfeited; though the *cestui que trust* may have relief in equity. And Sir J. Trevor, M. R., lays it down [in Eales *v.* England,] that if a trustee dies without heir, the lord by escheat shall have the land; yet subject to the trust in equity. (*b*)

Mr. Hargrave has controverted these authorities. As to the first, he says he was in possession of Lord Bridgeman's own manuscript reports of his judgments while he was Chief Justice of the Common Pleas: † compositions far exceeding Carter's *account of the judgments, in copiousness, depth, *419 and correctness; in which there was not an *iota* which in the least imported an opinion, that upon escheat the lord comes in subject to any trust; and as to the second, the opinion seemed too much of a loose *dictum* to command much attention. (*c*)

39. In a case determined in 17 Cha. II. where a person seised in fee contracted to sell his estate, and died before assurance, without any heir, so that the lands escheated to the lord, the Court refused to compel the lord to convey to the vendee; which could only be upon the principle that the lord by escheat was not compellable in equity to execute a trust. (*d*)

(*a*) Reeve *v.* Att.-Gen. 2 Atk. 223. 1 Vez. 446, Belt's ed. 1818. 2 Scho. & Lef. 617.
(*b*) Carter, 67. Prec. in Chan. 200. (*c*) Juris. Exer. Vol. I. 390.
(*d*) Stephens *v.* Baily, Nels. 107. *Vide* Pawlett *v.* Att.-Gen. sup.

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† These judgments have been published from Mr. Hargrave's MSS.—*Note to former edition.*

40. It is said by Lord Macclesfield, that if a trustee of a copyhold dies without heir, the lord becomes entitled by escheat, without being subject to the trust. (*a*)

41. There were formerly officers called *escheators*, whose duty it was to find offices upon the death of the King's tenants, for the purpose of ascertaining whether they left any heirs, and to certify their inquisitions into the Exchequer.[1] But these offices have long since ceased;[2] and now, where a person is supposed to have held his lands of the Crown, and to have died without heirs, a commission of escheat is issued, to ascertain the facts.

42. In a modern case, Lord Eldon said it was usual for the Crown to give to the person making discovery of an escheat, as good a lease of the lands escheated as it could. (*b*) [3]

(*a*) 1 Stra. 454. Williams *v.* Lonsdale, 3 Ves. 752. (*b*) 7 Ves. 71. *Vide* tit. 34.

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[1] Though a writ of escheat were necessary by the common law, where lands escheated to the intermediate lord, in order completely to vest the estate in him; yet, if a possession in law were cast upon the King, or he became entitled by escheat, no office was necessary, but he might seize without it, because the freehold was cast upon him by law, in actual possession. The Sadler's case, 4 Rep. 58; 6 Com. Dig. *Prærog.* D. 70; 3 Com. Dig. *Escheat*, B. 1. In the United States, when the title to lands fails from defect of heirs or devisees, it necessarily reverts to the people, as part of the common stock, and vests immediately in the State, by operation of law, and without office found. 4 Kent, Comm. 424; Montgomery *v.* Dorion, 7 N. Hamp. R. 475; Rubeck *v.* Gardiner, 7 Watts, 455; O'Hanlon *v.* Den, 1 Spencer, 31; [Den *v.* O'Hanlon, 1 New Jersey, 582; Holliman *v.* Peebles, 1 Texas, 673.] But in *Virginia*, it has been held that this doctrine applies only where the possession is vacant; and that if there is an adverse possession, an entry by the officer of the State is necessary, in order to give it possession. Commonwealth *v.* Hite, 6 Leigh, 588.

[2] Such officers exist in several of the United States; their duties being defined by statute.

[3] In regard to the disposition of lands escheated, there is no general rule or practice in the United States, unless it be that they go into the general mass of public property. But in *Vermont, Florida, Michigan, Tennessee, Indiana,* and *Mississippi*, the proceeds of escheated estates are appropriated by general statutes, in all cases, either to the support of common schools, or to the general encouragement of learning. In *South Carolina*, the general practice, as deduced from very many special statutes, seems to be, to grant the estates, either to relatives of the intestate, not otherwise entitled by law to inherit, or to particular colleges, academies, or common schools. In *North Carolina*, they are appropriated to the University of the State. See Vermont, Rev. St. 1839, p. 292, § 3; Florida, Rev. St. 1847, tit. 6, ch. 1, p. 403, 404; Michigan, Rev. St. 1846, ch. 67, p. 274; Tennessee, Rev. St. 1827, ch. 64; Indiana, Rev. St. 1843, p. 438, § 125; Mississippi, Rev. St. 1840, ch. 9, § 1, p. 120; North Carolina, Rev. St. 1837, Vol. II. p. 428.

[The purchaser of lands at a sheriff's sale upon execution, if he receives the sheriff's certificate, and dies before the expiration of the time of redemption, dies "seised" of

the premises within the meaning of the New York Statutes relating to Escheats. Englishbe *v.* Helmuth, 3 Comst. 294. See N. Y. Rev. Stat. (4th ed.) Vol. I. p. 559, Tit. XII. § 10, Part I. Ch. IX. An escheat grant passes all the lands comprehended in the true location of the land escheated; but it is otherwise when it clearly appears that the escheat grant was not intended to include it all, and when the party that took the escheat warrant knew that it did not. Jones *v.* Badley, 4 Md. Ch. Decis. 167. An escheat patent is *primâ facie* evidence of an escheat at the date of the warrant, but not before. Peterkin *v.* Inloes, Ib. 175; Wilson *v.* Inloes, 6 Gill, 121.]

TITLE XXXI.

PRESCRIPTION.

BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES. Book II. ch. 17.
KENT'S COMMENTARIES. Vol. III. Lect. 52, § 2.
WILLIAM BEST. Treatise on Presumptions, &c., ch. 3.
JOHN H. MATHEWS. Treatise on the Doctrine of Presumptions, &c.
MARK NAPIER. Commentaries on the Law of Prescription in Scotland.
J. MASCARDUS. De Probationibus, Concl. 1219–1223, Vol. III, p. 413–434.
M. TROPLONG. Le Droit Civil Expliqué. De la Prescription.
CIVIL CODE OF LOUISIANA. Tit. 23, ch. 3, and the Authors and Cases cited in the Notes of Upton and Jennings.
JOSEPH K. ANGELL. On Adverse Enjoyment.
The Same. Treatise on the Limitations of Actions, &c.
WILLIAM BALLANTINE. Treatise on the Statutes of Limitation.
WILLIAM BLANSHARD. Treatise on the Statutes of Limitation.

CHAP. I.

PRESCRIPTION BY IMMEMORIAL USAGE.

CHAP. II.

STATUTES OF LIMITATION.

CHAP. I.

PRESCRIPTION BY IMMEMORIAL USAGE.

SECT. 1. *Origin of Prescription.*
6. *Prescription by immemorial Usage.*
8. *May be in the Person or in the Estate.*
10. *What may be claimed by.*
21. *Must be beyond Time of Memory.*
SECT. 25. *And have a continued Usage.*
28. *And be certain and reasonable.*
34. *How a Prescription may be lost.*
41. *Descent of prescriptive Estates.*

SECTION 1. By the law of nature, occupancy not only gave a right to the temporary use of the soil, but also a permanent

property in the substance of the earth itself, and to every thing annexed to or issuing out of it. Hence possession was the first act from which the right of property was derived; it has therefore been established as a rule of law, in every civilized country, that a long and continued possession should give a title to real property.

2. This mode of acquisition was well known in the Roman law by the name of *usucaptio*, because a person who acquired a *title in this manner might be said, *usu rem* *421
capere; and is thus defined by Modestinus, *Adjectio dominii per continuationem possessionis temporis lege definiti.* In the English law it is called *prescription;* and Lord Coke says, *prescriptio est titulus ex usu et tempore substantiam capiens, ab authoritate legis.* (*a*)

3. The doctrine of prescription appears to have been long established in England; and, from what is said of it in Bracton, seems to have been derived from the Roman law; for he lays it down that a title may be gained, both to corporeal and incorporeal hereditaments, by a long and uninterrupted possession. *Dictum est in precedentibus, qualiter rerum corporalium dominia ex titulo, et justa causa acquirendi, transferuntur per traditionem. Nunc autem dicendum qualiter transferuntur sine titulo, et traditione, per usucaptionem; scil. per longam, continuam, et pacificam possessionem, ex diuturno tempore, et sine traditione.* (*b*)

4. Every species of prescription, by which property is acquired or lost, is *founded on this presumption*, that he who has had a quiet and uninterrupted possession of any thing, for a long period of years, is supposed to have a just right, without which he could not have been suffered to continue in the enjoyment of it. For a long possession may be considered as a better title than can commonly be produced, as it supposes an acquiescence in all other claimants; and that acquiescence also supposes some reason for which the claim was forborne.[1]

5. By the law of England, a *prescription can only be made to incorporeal hereditaments*, such as rents, rights of way, and com-

(*a*) Vin. ad Inst. Lib. 2, tit. 6. 1 Inst. 113 a, b. (*b*) Bracton, Lib. 2, c. 22.

[1] On the law of prescription, in addition to the books at the head of this title, the student is referred to 2 Greenleaf on Evidence, tit. Prescription and Custom, § 537–546.

mon, &c., for no prescription can give title to lands or other corporeal inheritances, of which more certain evidence may be had. Thus, Sir W. Blackstone says, a man shall not be said to prescribe that he and his ancestors have immemorially used to hold the castle of Arundel; for this is clearly another sort of title, a title by corporeal seisin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription.[1] But as to a right of way, a common, or the like, a man may be allowed to prescribe, for of these there is no corporeal seisin. The enjoyment will be frequently by intervals; and, therefore, the right to enjoy them can depend on nothing else but immemorial usage. There is, however, *another kind* of prescription established by the *statute law*, extending to cor-
422* poreal * hereditaments, by which an uninterrupted possession, for a certain number of years, will give the possessor a good title, by taking from all other persons the right of entering on such hereditaments, or of maintaining any species of action for the recovery of them. (*a*)

6. There are, therefore, *two kinds* of prescription known to the English law. *First*, a prescription to incorporeal hereditaments *by immemorial usage;* as where a person shows no other title to what he claims than that he and all those under whom he claims, have immemorially used to enjoy it; which may be called a *positive prescription.*

7. A prescription by immemorial usage, *differs from custom* in this respect, that a custom is properly a local usage, not annexed to the person; such as the custom that all the copyholders of a manor have common of pasture upon a particular waste; whereas prescription is always annexed to a particular person (*b*)[2]

(*a*) (Doct. & St. Dial. 1, c. 8. Wilkinson *v.* Proud, 11 M. & W. 33.) See stat. 2 & 3 Will. 4, c. 71, s. 2. (2 Bl. Comm. 264.) (*b*) 1 Inst. 113 b. 4 Rep. 31 b.

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[1] A man may prescribe to be tenant in common of land with another. 8 H. 6, 16 b.; Bro. Abr. Præscription, 19; Trespass, 122; 2 Roll. Abr. 264; Præscription, B.; Lit. § 310. But he cannot prescribe for a joint-tenancy, for to this there is a survivorship annexed by law. 1 Inst. 195 b.

[A grantee, to whom one of two joint-tenants sells and conveys the land owned jointly, and who enters into possession, holds title and possession adverse to the other joint-tenant, and if it is continued for twenty years, the right of the other joint-tenant is barred. Larman *v.* Huey, 13 B. Mon. 436.]

[2] The same rights and privileges which may be claimed as a custom, may also be

8. *This kind* of prescription *is of two sorts.* Either it is a *personal right*, which has been exercised by a man and his ancestors, or by a body politic and their predecessors; or else it is a right *attached to the ownership of a particular estate*, and only exercisable by those who are seised of that estate. In the *first* case it is termed a prescription in the person; in the *second* case it is called a prescription in a *que estate.*

9. A prescription in a *que estate* must always be laid in the person who is seised of the *fee simple.* A tenant for life, for years, or at will, or a copyholder, cannot prescribe in this manner, by reason of the imbecility of their estates; for, as prescription is always beyond time of memory, it would be absurd that those whose estates commenced within the memory of man should intend to prescribe for any thing. Therefore a tenant for life must prescribe under cover of the tenant in fee simple, and a copyholder under cover of his lord. (*a*)

10. It has been stated that prescription by immemorial usage *only extends to incorporeal hereditaments*, such as rents, commons, ways, &c.† *Nothing*, however, can be *claimed by* **prescription* which owes its origin to *matter of record;*[1] *423

(*a*) 6 Rep. 60 a.

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claimed by prescription; but not *vice versâ.* If they are common to any territorial district, as a local right, they are held as a custom; but if they are limited to an individual and his descendants, or to a corporation, or to the owners of a particular parcel of estate, they are held as a prescription. Perley *v.* Langley, 7 N. Hamp. 233. [See Race *v.* Ward, 30 Eng. Law & Eq. 187; Bland *v.* Lipscombe, Ib. 189.]

† By the general law, all pews in a church belong to the parishioners at large; but the distribution among them rests with the ordinary. There may, however, be a right paramount to the ordinary by immemorial usage; but this prescriptive right must be annexed to the occupation of a *messuage*, and all repairs must have been done at the expense of the party setting up the prescription. Pettman *v.* Bridger, 1 Phil. 316.—*Note to former edition.*

[1] The distinction is to be carefully noted, between a prescription, technically considered, and the presumption of a lost grant or record, which the jury may find from lapse of time and other circumstances. The latter is only a mode of establishing, by secondary evidence, the former existence of the record or other written document, which cannot now be produced. And this mode of proof is admitted, even against the sovereign, notwithstanding the maxim, *Nullum tempus occurrit regi.* Thus, royal grants have been found by the jury, after long continued and peaceable enjoyment, for a great length of time, accompanied by the usual acts of ownership. See 1 Greenl. on Evid. § 45, and cases there cited. So, after less than forty years' possession of a tract of land, and proof of a prior order of council for surveying it, and of an actual survey pursuant to

for prescription being only an usage *en pais*, does not extend to those things which can only be acquired by matter of record; such as goods and chattels of traitors, felons, and fugitives; deodands, &c., but to treasure trove, waifs, estrays, wrecks, park, free warren, fairs, markets, and the like, a title may be made by prescription. (*a*)

11. A prescription by immemorial usage, *can in general only be for things which may be created by grant;*[1] for the law allows prescriptions only to supply the loss of a grant. Ancient grants must often be lost; and it would be hard that no title could be made to things lying in grant, but by showing the grant. Upon immemorial usage, therefore, the law will presume a grant, and a lawful beginning; and allows such usage for a good title; but still it is only to supply the loss of a grant. Therefore, for such things as can have no lawful beginning, nor be created at this day, by any manner of grant, or reservation, or deed, that can be supposed, a prescription is not good. (*b*)

12. A person may have frank foldage by prescription, but it must be appendant to land; and a man may prescribe that he and his ancestors, time out of mind, have had frank foldage of the beasts of his tenants, in a particular place. (*c*)

13. In trespass, the defendant justified under a prescription, that the lords of the manor of H. had, and always used to have, free foldage throughout the vill of H., and to have the penning of the sheep; so that the vill of H. ought not to have free foldage, without the consent of the lord; and that if any

(*a*) Tit. 27, s. 95. I Inst. 114 a. 5 Rep. 109 b. (Brunswick *v.* M'Kean, 4 Greenl. 508.)
(*b*) 1 Vent. 387. Gibson *v.* Clark, 1 Jac. & Walk. 159. (*c*) 1 Inst. 114 b.

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the order, the jury were properly instructed to presume that a patent had been duly issued. Jackson *v.* McCall, 10 Johns. 377. This presumption, however, seems not to be made against the State, from lapse of time alone, so readily as against an individual; but still it may be made; and a much shorter period, accompanied by circumstances tending to fortify the presumption, will suffice to establish it, than would otherwise be requisite. Crooker *v.* Pendleton, 10 Shepl. 339. The records of a court may be proved by the like method. Battles *v.* Holly, 6 Greenl. 145. So, of the records of a corporation. Farrar *v.* Merrill, 1 Greenl. R. 17; Bull. N. P. 211; 4 Rep. 78; Cowp. 110.

[1] [The public cannot require an easement by prescription. A prescription supposes a grant; and in the case of the public, there can be no grantee. Curtis *v.* Keesler, 14 Barb. 511.]

levied a fold, without such consent, the lord had used to abate it. (*a*)

It was urged, that this prescription was void, being against common right, which gave every one foldage in his own land. *Sed non allocatur*, for every prescription is against common right, and it did not extend to deprive the owner of the whole interest and profit of his land, which would not have been good; but only precluded him from setting up hurdles, which was a reasonable prescription, and restrained a particular profit only. (*b*)

14. In a modern case, it was held that an ancient grant without date, does not necessarily destroy a prescriptive right; for such grant may either be prior to the time of memory, or in confirmation of such prescriptive right.

*15. In trespass, the defendants pleaded that Clode was *424 seised of a messuage, &c.; that he and all those whose estate he had, &c., for the time being, had and used, and had been accustomed to have and use, and so still of right ought to have and use, common of pasture in the place where, &c., for all commonable cattle, *levant* and *couchant*, &c., and thereupon justified. The plaintiff traversed the right of common; and produced two ancient charters, without date, containing a grant of common. The Judge being of opinion that these grants were inconsistent with the plea of prescription, a verdict was given for the plaintiff.

Upon a motion for a new trial, it was urged for the defendant, that these grants might only be in confirmation of an antecedent prescriptive right; and then were not inconsistent with it. The Court was of opinion, that these grants might either be before time of memory, or else they might have been only in confirmation of a prior right; in neither of which cases would they have been inconsistent with a plea of prescription. It ought to have been left to the jury to decide whether either of these was the case. A new trial was granted. (*c*)

16. An *easement*, which is a service or convenience that one neighbor hath of another, without profit, as a way through his land, a sink, or such like, may be claimed by prescription: but a multitude of persons cannot prescribe for an easement, though they may plead a custom. (*d*)

(*a*) Jeffery at Hay's case, 8 Rep. 125.
(*b*) Punsany *v.* Leader, 1 Leon. 11.
(*c*) Addington *v.* Clode, 2 Black. R. 989.
(*d*) Kitch. Courts, 105 b.

17. There can be *no prescription for what the law gives of common right;* therefore a lord of a manor cannot prescribe to have a court baron within his manor; because it is of common right, and incident to a manor. But a lord of a manor may prescribe to enlarge the jurisdiction of his court. (*a*)

18. Where a person prescribes in a *que estate*, he can claim nothing under such prescription but what is *appendant or appurtenant to land;* for it would be absurd to claim any thing as the consequence of an estate, with which the thing claimed has no connection. (*b*)

19. A person cannot prescribe for any thing in a *que estate* that *lies in grant*, and *cannot pass without deed* or fine; but
425 * in * him and *his ancestors* he may, because he comes in by descent, without any conveyance. (*c*)

20. Although prescription in general only extends to incorporeal inheritances, yet Littleton says, *tenants in common* may be by title of prescription; as if the one and his ancestors, or they whose estate he hath in one moiety, have holden in common the same moiety with the other tenant, who hath the other moiety, and with his ancestors, or with those whose estate he hath, undivided, for time out of mind. (*d*)

Lord Coke observes on this passage, that it is founded on good authority: but that joint tenants cannot be by prescription, because there is a survivorship between them, though not between tenants in common.

21. There are *two circumstances* necessary to form a prescription. *First, time whereof the memory of man runneth not to the contrary;* which has long since been ascertained, by the law, to commence from the beginning of the reign of King Richard I.; though Sir W. Blackstone justly observes, it seems unaccountable that the date of legal prescription or memory should still continue to be reckoned from an æra so very antiquated. (*e*) [1]

(*a*) Pill *v.* Towers, Cro. Eliz. 791. (And see Tinkham *v.* Arnold, 3 Greenl. R. 120.)
(*b*) Lit. s. 188. (*c*) 1 Inst. 121 a. (*d*) Lit. s. 310.
(*e*) Lit. s. 170. 2 Inst. 238, 239. 2 Inst. 81 n.

[1] When writs of right were limited to a fixed period, it was thought unreasonable to allow a longer time to claims by prescription; and accordingly prescriptive rights were held indefeasible, if proved to have existed previous to the first day of the reign of King Richard I., that being the earliest limitation of writs of right; and were invalidated if shown to have had a subsequent origin. When later statutes reduced the

22. This time is understood, not only of the memory of any man living, but also of *proof by any record or writing to the*

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period of limitation of real actions to a certain number of years, computed back from the commencement of each action, it was to have been expected, that the period of legal memory in regard to prescriptions, would have been shortened by the courts of law in like manner, upon the same reason; but it was not done, and the time of prescription for incorporeal rights remained as before. This unaccountable omission has occasioned some inconvenience in the administration of justice, and some conflict of opinion on the bench, and in the profession at large. The inconvenience, however, has been greatly obviated in practice, by introducing a new kind of title, namely the presumption of a grant, made and lost in modern times; which the jury are advised or directed to find, upon evidence of enjoyment for sufficient length of time. But whether this presumption is to be regarded as a rule of law, to be administered by the Judges, or merely as a subject fit to be emphatically recommended to the jury, is still a disputed point in England, though now reduced to little practical importance, especially since the recent statute on this subject. See stat. 2 & 3 W. 4, ch. 71, § 1, 2, 3; 2 Greenl. on Evid., § 538; Gale & Whatley on Easements, p. 89–97; Pritchard *v.* Powell, 10 Jur. 154.

In the United States, grants have been very freely presumed, upon proof of an *adverse, exclusive, and uninterrupted enjoyment for twenty years;* it being the policy of the courts of law to limit the presumption to periods analogous to those of the statutes of limitation, in all cases where the statutes do not apply; but whether this was a presumption of law or of fact, was for a long time as uncertain here as in England, and perhaps may not yet be definitively settled in every State. But by the weight of authority, as well as the preponderance of opinion, it may be stated as the general rule of American law, that such an enjoyment of an incorporeal hereditament affords a conclusive presumption of a grant, or a right, as the case may be; which is to be applied as a *præsumptio juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law. Tyler *v.* Wilkinson, 4 Mason, 402, per Story, J.; 1 Greenl. on Evid. § 17; Sims *v.* Davis, 1 Cheves, R. 2; 3 Kent, Comm. 441, 442. And see the luminous judgment of Mr. Justice Wilde, in Coolidge *v.* Learned, 8 Pick. 504. See also Sargent *v.* Ballard, 9 Pick. 251; Melvin *v.* Whiting, 10 Pick. 295; Bolivar Man. Co. *v.* Neponset Man. Co. 16 Pick. 241; Norton *v.* Voluntine, 14 Vt. R. 239; Stiles *v.* Hooker, 7 Cowen, 266; Campbell *v.* Smith, 3 Halst. 140; Rogers *v.* Page, Brayt. 169; Tinkham *v.* Arnold, 3 Greenl. 120; Strickler *v.* Todd, 10 S. & R. 63. This rule seems to be expressly recognized in the statutes of *Maine* and *Massachusetts;* and is either assumed or necessarily implied in those of *New Jersey, North Carolina, Delaware, Kentucky, Alabama, Missouri*, and *New York*. See 2 Greenl. on Evid. § 539, and note (1), and cases there cited. [But see *contra*, Myers *v.* Gemmel, 10 Barb. Sup. Ct. 537. And see Parker *v.* Foote, 19 Wend. 309; Banks *v.* Am. Tract Soc. 4 Sandf. Ch. 438.] In order, however, that the enjoyment of an easement in another's land may be conclusive of the right, it must have been adverse, that is, under a claim of title, injurious to the rights of the owner of the land, yet with his knowledge and acquiescence, and uninterrupted; and the burden of proving this is on the party claiming the easement. If he leaves it doubtful in these particulars, it is not conclusive in his favor. Sargent *v.* Ballard, 9 Pick. 251; Davies *v.* Stephens, 7 C. & P. 570; Jarvis *v.* Dean, 3 Bing. 447; Daniel *v.* North, 11 East, 372; Pierre *v.* Fernald, 13 Shepl. 436; Atkins *v.* Chilson, 7 Met. 398. [A wife has no such privity of estate with her husband of land in which he died in

contrary; for if there be any sufficient proof by record, or writing, although it exceed the memory or proper knowledge of any man living, yet it is within the memory of man. For memory or knowledge is twofold: first, knowledge by proof, as by record or sufficient matter of writing; secondly, by a man's own proper knowledge. (*a*)

23. It follows that, where there is any proof of the commencement † or origin of a right, since the time of Richard I., it cannot be claimed by prescription.

24. A vicar, endowed *de minutis decimis*, in the year
426 * 1310, sued * the parson appropriate for them. It was held that the parson could not prescribe against this endowment, though it was three hundred years past; for the prescription ought to commence since the endowment, which was subsequent to the time of limitation. (*b*)

25. *Secondly*, every prescription must have a *continued and peaceable usage and enjoyment;* for if repeated usage cannot be proved, the prescription will fail. But where a title has once

(*a*) 1 Inst. 115 a. (*b*) Pringe *v.* Child, 2 Roll. Ab. 269.

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adverse possession to the real owner, that her continued adverse possession can be tacked to his, to give her a complete title by disseisin. Sawyer *v.* Kendall, 10 Cush. 241.]

Where the right to maintain a dam and raise a mill-pond, was claimed from an enjoyment for the legal period, it was held that the time was to be computed, not from the commencement, but from the completion of the dam. Branch *v.* Doane, 17 Conn. R. 402, 419.

The period of *twenty years* is the one most frequently mentioned in the United States, as the legal period of prescription; but as this period seems originally to have been adopted from analogy to the Statute of Limitations, the rule, as to the length of time, varies in the different States, according to the period fixed by law as the ultimate limit of real actions. Accordingly, fifteen years is held sufficient in *Vermont* and *Connecticut;* Shumway *v.* Simons, 1 Vt. 53; Mitchell *v.* Walker, 3 Aik. 266; Sherwood *v.* Burr, 4 Day, 244; Ingraham *v.* Hutchinson, 2 Conn. 584; and seven years in *Tennessee.* Patton *v.* Hynes, Cooke, R. 356; McIver *v.* Regan, Ibid. 366. See 3 Kent, Comm. 441, note (c.) See also *post*, ch. 2, § 14, note.

† [The stat. 2 & 3 Will. 4, c. 71, shortens the time of prescription in certain cases, and enacts that claims to rights of common and other profits, *à prendre*, shall not be defeated after thirty years' enjoyment, by showing only the commencement; and that after sixty years' enjoyment, the right shall be absolute, unless it shall appear that such right was had by consent or agreement, by deed or writing; and with respect to claims to rights of way or other easements, the periods are limited to twenty and forty years; and with respect to claims to the use of light, to twenty years. The act does not extend to Scotland or Ireland. s. 9.]

been gained by prescription, it will not be lost by any interruption of the *enjoyment* of it for ten or twenty years. (*a*) [1]

26. Thus, if a person has a right of common by prescription, and he takes a lease of the land for twenty years, whereby the common is suspended, he may, after the determination of the

(*a*) 1 Inst. 113 b. (Odiorne *v.* Wade, 5 Pick. 421.) See 2 & 3 Will. 4, c. 71, s. 2. (Melvin *v.* Whiting, 12 Pick. 295.)

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[1] The possession or enjoyment, on which a prescriptive title is founded, must be open, peaceable, continued, and unequivocal; it must also be adverse, that is of a nature to indicate that it is claimed as a right, and is not the effect of indulgence, or of any compact, short of a grant. Gayetty *v.* Bethune, 14 Mass. 49, 53; per Parker, C. J.; Lawton *v.* Rivers, 2 McCord, 445; Lajoye *v.* Primm, 3 Mis. 529. [Where one has used a road over land of another at his pleasure, without asking leave and without objection, such user is adverse. Garrett *v.* Jackson, 20 Penn. (8 Harris,) 331. The mere inattention of the owner of land to the fact that an easement in it is used by another, does not weaken the force of the presumption which the lapse of time creates. Reimer *v.* Stuber, Ib. 458. The fencing of three sides of a square piece of land, is not a sufficient inclosure to make an adverse possession so as to vest a title in a wrongdoer, as against the real owner, though such fences exclude the latter from the use and enjoyment of the land. Armstrong *v.* Risteau, 5 Md. Ch. Decis. 256; Hoye *v.* Swan, Ib. 237. To make an user adverse, it must constitute a legal injury for which an action would lie. Napier *v.* Bulwinkle, 5 Rich. 311.

A right of way over uninclosed woodland, may be acquired by user for twenty-one years. Reimer *v.* Stuber, 20 Penn. (8 Harris,) 458. But see Hutto *v.* Tindall, 6 Rich. 396. In *Illinois*, no inference or conclusion will be drawn against the owner of land lying uninclosed and travelled over to establish an easement in favor of the public. Warren *v.* Jacksonville, 15 Ill. 236.] No adverse right can grow out of a mere permissive enjoyment. Medford *v.* Pratt, 4 Pick. 222; Gloucester *v.* Beach, 2 Pick. 60, note. And see Kirk *v.* Smith, 9 Wheat. 241, 289, 290; Baker *v.* Boston, 12 Pick. 184. The character of the enjoyment, as being by indulgence or permission of the owner, may be shown either by writing, or by the acts or relations of the parties, or by the verbal admissions of the claimant or party enjoying. Sumner *v.* Tileston, 7 Pick. 198; Church *v.* Burghardt, 8 Pick. 327; Jackson *v.* Burton, 1 Wend. 341.

[Thus, where shore owners had the right to appropriate and fill up flats to a certain depth, subject to the public use of the flats covered with water as a highway, until they were so filled up, such use, for more than one hundred years, of flats at the foot of a street belonging to the city of Boston, affords no presumption of a dedication of them to the public as a highway, but is simple permission under the statute. Boston *v.* Lecraw, 17 How. U. S. 426. See Cole *v.* Sprowl, 35 Maine, (5 Red.) 161; State *v.* Nudd, 3 Foster, (N. H.) 327; Smith *v.* State, 3 Zabr. 130; Hoole *v.* Attorney-General, 22 Ala. 190; Kelly's case, 8 Gratt. 632; Bowers *v.* Suffolk Man. Co. 4 Cush. 332; Miller *v.* Garlock, 8 Barb. Sup. Ct. 153; Wiggins *v.* Tallmadge, 11 Ib. 457; Stacey *v.* Miller, 14 Mis. 478.

No presumption of a grant arises against a minor or feme covert from the adverse enjoyment of an easement; but a second disability added to one which existed when the adverse enjoyment first began, is always disregarded; thus, a coverture which took place during infancy, is not taken into the account after the infancy is ended. Reimer *v.* Stuber, 20 Penn. (8 Harris,) 458.]

lease, claim the common again by prescription, for the suspension was only of the enjoyment, not of the right. (*a*)

27. Formerly, a person might have prescribed for a right, though the enjoyment of it had been suspended for an indefinite time; but this is now altered, as will be shown in the next chapter.

28. A prescription *must be certain;* therefore a prescription to pay for tithes a penny or *thereabouts*, for every acre of arable land, is bad. It *must also be reasonable;* thus a prescription for setting out tithes, without the view of the parson, is void, as being unreasonable. But a prescription may be reasonable, though it be unusual or inconvenient; as for a person to have a way over a churchyard, or through a church. (*b*)

29. A person *cannot prescribe to do a wrong*, or any thing that would be a nuisance to others; as to erect a dove-cote or pigeon-house on his lands, if it be a nuisance; or to lay logs of wood in the highway, and suffer them to continue there for a long time; for this is also a nuisance. (*c*)

30. There can be *no prescription against an act of parliament;* because that is the highest proof and matter of record in law; but a man may prescribe against an act of parliament, when his prescription is saved or preserved by another act of parliament. (*d*)

31. Lord Coke says, there is a diversity between an act of parliament in the negative, and in the affirmative; for an affirmative act does not take away a custom. Moreover, there is a diversity between statutes that are in the negative; for if a
427 * * statute in the negative be declaratory of the ancient law, that is, in affirmance of the common law; there, as well, a man may prescribe or allege a custom against the common law; so a man may do against such statute; for *consuetudo privat communem legem.* (*e*)

32. Mr. Hargrave has observed upon the above passage, that this appears to be a good rule; for if a statute is merely declaratory of the common law, the latter should be construed as it was before the recognition by parliament; consequently, its operation should not be extended to the destruction of prescriptions and

(*a*) (1 Inst. 113 b.)
(*b*) 2 Roll. Ab. 265. Hob. 107.
(*c*) Dewell *v.* Saunders, Cro. Jac. 491. Fowler *v.* Sanders, Ib. 446.
(*d*) 1 Inst. 115 a.
(*e*) Ibid.

customs, which were before allowable. As to the use of negative words in such a case, they might either arise from the subject, or be a mode of expressing what the common law was; in either of which cases there could not be any color of reason for giving more effect to negative, than belonged to affirmative words. In short, to say that a statute, merely declaratory of the common law, being expressed in the negative words, should operate on subjects to which the common law was not applicable, seemed to be a direct contradiction; for how could a statute be merely declaratory, if it was in any degree introductive of a new law. However, there were books in which Lord Coke's distinction, in respect to negative statutes declaratory of the common law, was denied. (*a*)

If those who opposed his opinion had meant only to say, that in the instances by which he illustrated this rule, the negative words of the statutes not only imported something more than a declaration of the common law, but were also intended to annihilate all particular customs clashing with it; or that on other accounts the instances were not apt; there might possibly be some color for their dissenting from Lord Coke; but what was professed to be controverted, was the distinction itself, which, as he understood it, seemed to be perfectly unexceptionable.

33. A man *cannot prescribe against another's prescription;* for the one is as ancient as the other; thus, if a man prescribes *for a way, a light, or any other easement, another *428 cannot allege a prescription to prevent the enjoyment of it. (*b*)

34. A prescription may be *lost by unity of possession*, of as high and perdurable an estate in the thing claimed, and in the land out of which it is claimed by such prescription, because it is an interruption in the right. (*c*)[1]

(*a*) 1 Inst. 115 a, note. W. Jones, 270, 271, 289.
(*b*) Aldred's case, 9 Rep. 57. 2 Mod. 105.
(*c*) 1 Inst. 114 b.

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[1] This is to be understood of an unity of possession of the *right* with an estate in the land as high and perdurable as that in the subject-matter of the right; as, for example, where one entitled in fee to a right of way, or of common, becomes seised in fee of the land itself. But if he takes a less estate, as, for example, an estate for years, it has only the effect of suspending the easement, but does not extinguish the prescription. Best on Presumptions, p. 92; Canham *v.* Fisk, 1 Price, P. C. 148; 2 C. & J. 126, S. S.; Hazard *v.* Robinson, 3 Mason, R. 272; Surrey *v.* Piggott, Latch,

35. So where the subject-matter of a prescription is *destroyed*, the prescription is lost; as if the repair of a castle be claimed by prescription, and the castle is destroyed, the prescription is gone. (*a*)

36. But no *alteration in the quality* of the thing to which a prescription is annexed, will destroy the prescription; as if a person prescribes in a *modus decimandi* for tithes of a park, and the park is disparked, yet the prescription continues; for it is annexed to the land. (*b*)

37. So, if a man has *estovers* by prescription *to his house*, although he *alters* the rooms and chambers of it, as to make a parlor where there was a hall, or a hall where the parlor was; and the like alteration, of the qualities, not of the house itself; without making new chimneys; *by which no prejudice accrues to the owner of the wood;* it is not any destruction of the prescription. Although he builds new chimneys, or makes an addition to the old house, he shall not lose his prescription; but he cannot employ any of his estovers in the new chimneys, or in the part newly added. (*c*)

38. A person having two old fulling mills, to which was annexed, by prescription, a right to a watercourse, pulled them down, and erected two mills to grind corn. It was resolved, that as the mill was the substance, and the addition demonstrated only the quality, and the alteration was not of the substance, but only of the quality, or the name of the mill without any prejudice in the watercourse to the owner, the prescription remained. (*d*) [1]

(*a*) 4 Rep. 88 a. (*b*) Cowper *v.* Andrews, Hob. 39. (*c*) 4 Rep. 87 a.

(*d*) Luttrel's case, 4 Rep. 86. (Blanchard *v.* Baker, 8 Greenl. 253. 3 Dane, Abr. 5, § 11. Simpson *v.* Seavy, 8 Greenl. 138. Saunders *v.* Newman, 1 B. & Ald. 253. Strickler *v.* Todd, 10 S. & R. 63. And see Biglow *v.* Battle, 15 Mass. 313.)

153; Poph. 166, S. C. And see Angell, on Watercourses, ch. 2, § 6; Louisiana Civ. Code, art. 801, 802; Manning *v.* Smith, 6 Conn. R. 289. [A right of way appurtenant to land, over and upon adjoining land, is not extinguished by the vesting of both estates in the same person as mortgagee, under separate mortgages, until both mortgages are foreclosed. Ritger *v.* Parker, 8 Cush. 145. See also, Ferguson *v.* Witsell, 5 Rich. 280.]

[1] [The uniform and uninterrupted diversion of water from a running stream for a period of twenty years, gives a title by prescription. It is not necessary that the water should be used in precisely the same manner, or applied in the same way, but no change is allowed which would be injurious to those whose interests are involved. Stein *v.* Bruden, 24 Ala. 130. And see Napier *v.* Bulwinkle, 5 Rich. 311; Cotton *v.* Pocasset Man. Co. 13 Met. 429; Renshaw *v.* Bean, 10 Eng. Law and Eq. Rep. 417.]

39. If a person has liberties by prescription, and after takes a grant of them by letters-patent from the King, this determines the prescription; for a matter in writing determines a matter in *fait.* (*a*)

40. It has been stated that a prescription must have a continual and peaceable usage and enjoyment; therefore, a prescription may be *lost, by neglecting to claim or exercise it.* (*b*) [1]

(*a*) Finch, B. 1, c. 3, s. 28.

(*b*) *Ante*, s. 25. (Bract. l. 2, c. 22. Just. Inst. l. 2, tit. 1, s. 46. Dig. l. 41, tit. 2, s. 8. Code Nap. art. 2221. Louis. Civ. Code, art. 3424.)

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[1] [A right of way once established by prescription, which presupposes a grant, or by a grant, cannot be extinguished by a parol agreement. Pue *v.* Pue, 4 Md. Ch. Decis. 386. An easement in real estate, whether acquired by grant or prescription, may be extinguished, renounced or modified by a parol license, granted by the owner of the dominant tenement, and executed by the owner of the servient tenement. Morse *v.* Copeland, 2 Gray, 302.] The philosophy of the general rule, that nonuser is evidence of the abandonment of a right, is discussed as follows by Mr. Napier, in his profound treatise on the Law of Prescription in Scotland. "The possession may be lost, and yet the right or affection to the property be retained. But possession being lost, the property may be lost also, by giving up that affection for the subject which constitutes the *animus dominandi*, and which is essential to the existence of a continued right of property. To dissolve, therefore, that legal tie, there must be consent as well as amission; 'Quemadmodum nulla possessio adquiri nisi animo et corpore potest, ita nulla amittitur nisi in qua utriumque in contrarium actum est." Dig. 41, 2, 8. That simple affection of the mind, by which a person wills that a thing, previously his property, should no longer remain so, without reference to any particular transference, constitutes what is called the *animus derelinquendi;* and that from which the mind has thus simply withdrawn affection is termed *res derelicta.* *Rem derelinquere* dicitur, qui, cum sua esset, eam non amplius suam esse *nude* vult, *parum scilicet solicitus* quinam eandem suam facere velit. Si rem tuam alteri vendis, eam quoque non amplius tuam esse vis, sed non *nude*, vis enim simul *ut sit emptoris.* Wolf. *Jus Naturæ*, 2, 2, 249. Property in this predicament was considered to have fallen back into the natural state of *res nullius*, and consequently to be again susceptible of becoming the poperty of the occupant. Quod nullius est, id, naturali ratione, occupanti conceditur.—*Inst. de rer. divis.* Dominium rerum ex naturali possessione cæpisse, Nerva filius ait. Ejusque rei vestigium remanere de his quæ terra, mari, cæloque capiuntur; nam protinus eorum fiunt qui primi possessionem eorum apprehenderint.—*Dig. de acq. vel amitt. poss.* l. 1, § 1. Hence, in the Roman law, which closely followed the law of nature, one of the legal causes for the acquisition of property, or for the entering possession *animo dominantis*, was the title *pro derelicto.*

"Actual dereliction, which is that of which we now speak, may either be expressly declared, or it may be left to be inferred from declaratory acts,—*verbis, vel factis, vel non factis.* Inst. 2, 1, 47.

"The will of the proprietor, when expressly declared, leaves no room for doubt; the doctrine of presumed dereliction is more difficult. 'It is not easy,' says Lord Stair, 'to be known when possession is detained by the mind, and when relinquished, wherein there is a general rule that dereliction is not presumed except it appears by

429* *41. Sir W. Blackstone observes, that estates acquired by prescription are not, of course, descendible to heirs

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evident declaratory acts or circumstances, as when it is thrown away in any public place, where it cannot be taken up, or when another is suffered to possess without contradiction, or when possessory acts have been long abstained from, all which conjectures are in *arbitrio judicis.*" Stair, 2, 1, 20.

"Upon universal principles of right reason, declaratory acts or circumstances may found not merely *præsumptio juris* of dereliction, but *præsumptio juris et de jure;* so that if the true owner at length appears, and would explain away the presumption of dereliction, he cannot be heard: for the nature of human society requiring that certain matters should not remain *in dubio*, it is natural and necessary, that a reasonable presumption of the fact should stand for the actual fact: 'Neque enim patitur natura humanæ societatis ut animi sufficienter indicati nulla sit efficacia; ideo quod sufficienter indicatum est, pro vero habetur, adversus eum qui indicavit.' Hence the principle of natural law, that a presumption of dereliction, once established upon reasonable grounds, and in circumstances where doubt would be detrimental to the plan of human society, cannot be contradicted as untrue, or complained of as iniquitous. 'Si constare certo nequit, quando interest ut constaret, num dominus suam dereliquerit, derelictio tamen presumitur; quod eam dereliquerit contra ipsum pro vero habetur.' Wolf, 3, 7, 1019, 1020.

"This doctrine of presumed dereliction is no legal fiction, therefore, contrived merely to cover the inequitable nature of prescriptive property; but is itself a rule of natural law, proving prescription to be equitable as arising out of the necessity of giving a fixed and final interpretation to the conduct of men in regard to their rights, whenever that conduct can be rationally considered a tacit manifestation of their will. In this manner the natural connection between possession and property, combined with the doctrine of presumed dereliction, composes a positive rule of absolute property, equal to the right of original occupation, or to a right by actual transference *a vero domino.*" See Napier on Prescription, p. 10–13.

In accordance with this doctrine, it was remarked by Lord Ellenborough, that the long enjoyment of a right of way by A, to his house, over the land of B, being injurious to the latter, may most reasonably be accounted for, by supposing a grant of such right by the owner of the land; and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient or prejudicial to the owner of the house, may most reasonably be accounted for, by supposing a release of the right. In cases of the former class, a *grant* of the right, and in the latter a *release* of it, is presumed. Doe *v.* Hilder, 2 B. & Ald. 791. But in general, an abandonment or release of the right is not presumed from non-user, unless for a great length of time, or accompanied with other circumstances. Eldridge *v.* Knott, Cowp. 214; Simpson *v.* Gutteridge, 1 Madd. R. 609; Best on Presumptions, 138; French *v.* Braintree Man. Co. 23 Pick. 216; Dyer *v.* Depui, 5 Whart. 584; Wright *v.* Freeman, 5 Har. & J. 467.

But here the distinction becomes important, between *continuous* easements, or those of which the enjoyment is or may be continual, without the necessity of any interference of man, such as the right to air, light, waterspouts, &c.; and *intermittent* easements, or those of an opposite character, such as rights of way, &c.

With respect to *continuous easements*, it seems, from the adjudged cases, that there is no precise term of time fixed by law, during which the cessation of enjoyment must continue, in order to raise the presumption of an abandonment of the right; but it is

general, like other purchased estates, but are an exception to the rule: for, properly speaking, the prescription is rather to be con-

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a question for the jury, to find the intention, from a consideration of all the circumstances of the case; and whether it was a temporary cessation of enjoyment, or a final abandonment. An essential and material alteration or change in the character of the dominant tenement is *primâ facie* evidence of an abandonment. See Best on Presumptions, 139, 140; Gale & Whatley on Easements, p. 16, 360, 362. But even this act is open to explanation. Liggins *v.* Inge, 7 Bing. 682, 693; Moore *v.* Rawson, 3 B. & C. 332, 339. "I think," said Mr. Justice Littledale, in this last case, "that if a party does any act to show that he abandons his right to the benefit of that light and air which he once had, he may lose his right in a much less period than twenty years. If a man pulls down a house and does not make any use of the land for two or three years, or converts it into tillage, I think he may be taken to have abandoned all intention of rebuilding the house; and, consequently, that his right to the light has ceased. But if he builds upon the same site, and places windows in the same spot, or does any thing to show that he did not mean to convert the land to a different purpose, then his right would not cease. In this case, I think that the owner of the plaintiff's premises abandoned his right to the ancient lights by erecting the blank wall instead of that in which the ancient windows were; for he then indicated an intention never to resume that enjoyment of the light which he once had. Under those circumstances, I think that the temporary disuse was a complete abandonment of the right." [The common law of England, on the subject of light and air as an easement, or incident to real estate, is not the law of this country. It was inapplicable to the condition of this country when settled by the colonists, and formed no part of the law in force here on the 19th April, 1775. Myers *v.* Gemmel, 10 Barb. Sup. Ct. 537. Whether the enjoyment of air and light over the land of another, is an easement in his land by the laws of New York, *quære.* Banks *v.* American Tract Society, 4 Sandf. Ch. 438.]

But with respect to *intermittent easements*, it seems clear, from their nature, that, in order to raise the presumption of release or abandonment from non-user alone, it ought to have reached the full period of twenty years; though the presumption may arise from a cessation of enjoyment for a much shorter period, when it is accompanied by such circumstances as an express disclaimer, or other indication of an intention to abandon the right forever. See Best on Presumptions, p. 140; Gale & Whatley, on Easements, p. 380, 381; Emerson *v.* Wiley, 10 Pick. 310, 316, where it was held, referring to 1 Inst. 114 b.; that a right of way could not be lost by non-user for a period less than twenty years. Williams *v.* Nelson, 23 Pick. 141; Payne *v.* Shedden, 1 M. & Rob. 383, per Patteson, J.; Hall *v.* Swift, 6 Scott, 167; 4 Bing. N. C. 381, S. C. In Carr *v.* Foster, 3 Ad. & El. N. S. 581, it was held, that where a commoner ceased for two years out of thirty to use the common, he having then no commonable cattle, the jury were justified in finding a continued enjoyment of the right. It seems sufficient if the party exercises the right as often as he has occasion to do so. Clayton *v.* Corby, 8 Jur. 212. [An easement to become extinguished by disuse, must have been acquired by use; the doctrine of extinguishment by non-user does not apply to servitudes or easements created by deed. Jewett *v.* Jewett, 16 Barb. Sup. Ct. 150. See Crain *v.* Fox, Ib. 184; Miller *v.* Garlock, 8 Ib. 153.]

Constitutional rights or privileges can never be lost by non-user. "Neither individuals, nor aggregate bodies, nor the government itself, can prescribe against the rights of the citizen, with respect to any privilege secured by the constitution." Baker *v.*

sidered as an evidence of a former acquisition, than as an acquisition *de novo.* Therefore, if a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes; the prescription in this case being a species of descent. But if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were required by descent or purchase; for every accessory followeth the nature of its principal. (*a*) [1]

(*a*) 2 Bl. Comm. 266.

Fales, 16 Mass. 488, 520. [Possession and use will not give an individual or a corporation a title to a franchise which is an encroachment on a public right. Penny Pot Landing *v.* Philadelphia, 16 Penn. State R. (4 Harris,) 79.]

[1] See tit. 29, ch. 3, note ad calc.

CHAP. II.

STATUTES OF LIMITATION.

SECT. 1. *Negative Prescription.*
4. *Statutes of Limitation.*
5. *As to Writs of Right.*
7. *As to Prescriptive Rights.*
8. *As to Avowries.*
10. *As to Writs of Formedon.*
14. *As to Entry upon Lands.*
20. *Effect of Twenty Years' Possession.*
22. *The Possession must be adverse.*
29. *A Lease postpones the Right of Entry.*
34. *Where a new Right accrues, a new Entry is given.*
SECT. 37. *How an Entry is to be made.*
40. *Must be followed by an Action.*
41. *Savings in the Statute* 21 *James* I.
44. *To what Persons and Estates they extend.*
46. *What are not within them.*
47. *Ecclesiastical Corporations.*
48. *Rents created by Deed.*
51. *Bond Debts.*
52. Nullum Tempus *Act.*
55. *Equity adopts the Doctrine of Limitations.*

SECTION 1. The *second* sort of prescription is that which arises from the several *Statutes of Limitation*, in consequence of which no action can be maintained, for the recovery of any real property, after an uninterrupted possession of a certain number of years. It is different from the prescription by immemorial usage; for by that a right is acquired to an incorporeal hereditament; but by this last kind, no positive right or title is acquired, but only the remedy for the recovery of either a corporeal or incorporeal hereditament is taken away; from whence it may be properly called a *negative prescription.* And in a modern case, the Court of King's Bench said, the Statutes of Limitation operated as an extinguishment of the remedy of the one, not as giving the estate to the other. (*a*)

2. This kind of prescription is as ancient as that which arises from immemorial usage. Thus we read in Bracton:—
*Longa * enim possessio (sicut jus) parit jus possidendi, et* * 431
tollit actionem vero domino petenti, quandoque unam,

(*a*) Davenport *v.* Tyrrel, tit. 19, § 9.

quandoque aliam, quandoque omnem. Quia omnes actiones in mundo, infra certa tempora, habent limitationem. (*a*)

3. By the old law no seisin could be alleged by the demandant in a real action, but from the time of King Henry I. By the statute of Merton, 20 Hen. III. the seisin must have been alleged from the time of King Henry II.; and by the statute of Westm. 1, 3 Edw. I. c. 59, the seisin must have been alleged from the time of King Richard I. (*b*)

4. The period established by the last of these statutes increased every day, till at last there was scarce any limitation at all; so that it became necessary to fix a certain time within which a claim to lands and tenements must be made, and beyond which an uninterrupted possession became a good title, by operating as a bar to every kind of action. This was effected by the statutes 32 Hen. VIII. c. 2, and 21 James I. c. 16, which were made for the purpose of quieting the titles to estates, and avoiding suits; and have therefore been called statutes of repose. (*c*)

5. The first section of the statute 32 Hen. VIII. enacts, "That no manner of person or persons shall sue, have, or maintain any writ of right,† or make any prescription, title, or claim of, to, or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corrodies, or other hereditaments, of the possession of his or their ancestor or predecessor; and declare and

(*a*) (Bract. lib. 2, c. 22.)
(*b*) 1 Inst. 114 b s. 3. 2 Inst. 94, 238.
(*c*) 3 Bl. Comm. 189.

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† [By the stat. 3 & 4 Will. 4, c. 27, s. 36, it is enacted, that no real and mixed actions shall be brought after the 31st December, 1834, with the exception of those founded on a writ of right of dower, a writ of dower, *unde nihil habet*, a *quare impedit*, and an ejectment, and also, except a plaint for freebench or dower; consequently, the writ of right above mentioned, and all other writs upon which real and mixed actions were founded, cannot, with the above exceptions, be brought, after that day, by any person then having a right of *entry*. By the 37th section, a further period of six months is allowed to those who, on the 31st day of December, 1834, shall have a right of *action*, but who shall not have a right of *entry*. By the 38th section, the rights of persons are saved who should be entitled on the 1st day of June, 1835, to real actions only, (their right of entry having been taken away by descent cast, discontinuance, or warranty,) and they are empowered to maintain their writ or action after the 1st day of June, 1835, but only within the period during which, by the provisions of the act, they might have made an entry upon the land, if their right of entry had not been so taken away.]

allege any further seisin or possession of his ancestor or *predecessor, but only of the seisin or possession of his *432 ancestor or predecessor which shall be seised of the said manors, &c., within threescore years next before the *teste* of the same writ." (*a*)

6. In consequence of this clause, a writ of right could not be maintained by any person without showing an actual seisin, taking the *esplees* or profits, either in the demandant himself, or the ancestor under whom he claimed, within sixty years.

7. As to incorporeal hereditaments, acquired by immemorial usage, the clause which has been just stated extends to them; therefore nothing could be claimed by prescription without showing a possession within sixty years.

8. By the 4th section of this statute it is enacted, "That no person or persons shall make any avowry or cognizance for any rent, suit, or service, or allege any seisin of any rent, suit, or service, in the same avowry or cognizance, in the possession of his or their ancestors, or predecessor or predecessors, or in his own possession, or in the possession of any other, whose estate he shall pretend or claim to have, above fifty years next before the making of the said avowry or cognizance." (*b*)

This section only extends to rents, suit, and service; and not to such services as may not accrue within the time limited in it, of which an account will be given hereafter.

9. In the two sections of this statute which have been stated, the word *seisin* is used generally and indefinitely. But it has been resolved that as to a writ of right, it shall be intended of an actual seisin; and as to avowries, it shall extend to a seisin in law, as well as to a seisin in fact. (*c*)

10. By the statute 21 James I. c. 16, s. 1, it is enacted, "That all writs of *formedon in descender*, *formedon in remainder*, and *formedon in reverter*,† of any manors, lands, tenements, or other hereditaments whatsoever, at any time thereafter to be sued or brought, by occasion or means of any title or cause thereafter

(*a*) Dally *v.* King, 1 H. Black. 1.
(*b*) Statute at Large, edit. 1816, fol.
(*c*) Bevil's case, 4 Rep. 6.

† [These writs are abolished by the stat. 3 & 4 Will. IV. c. 27, ss. 36, 37, 38. *Vide supra*, note to sec. 5 of this chapter.]

happening, shall be sued or taken within twenty years next after the title, and cause of action first descended or fallen; and at no time after the said twenty years."

11. [Until the recent case of Tolson *v.* Kane,] it was not determined whether, under this statute, a person claiming an
433* *estate tail by descent was barred by the neglect of the preceding person, entitled to the estate tail, in not making an entry, or bringing a writ of *formedon*, within twenty years from the time when his title accrued. It was contended, that he was not barred, because the issue in tail did not take in the character of heir to their immediate predecessor, but as issue of the body of the first donee, and described as such in the original gift of the estate tail, and were therefore not affected by any act of their ancestors:—That where a person became entitled to an estate tail, as son, nephew, or cousin, to the person last seised of it, a new title and cause of action first descended to him, as issue of the original donee; and so he was within the letter of the statute, and had a new period of twenty years to bring his *formedon*:—(*a*) and that although a tenant in tail might bar his issue by fine, in consequence of the statutes made for that purpose; and by a common recovery, on account of the supposed recompense in value; yet that, if he did not avail himself of these modes of barring his estate, it was still within the protection of the Statute *De Donis;* and he could not by any other positive act of his, or by his *laches*, destroy the rights of those who became entitled to it after his death. (*b*)

12. The general opinion, however, was, that in consequence of the words *first descended*, if a person entitled to an estate tail neglected to bring his writ of *formedon* within twenty years after his title first descended, he and also his issue would be barred; for if the issue brought a *formedon*, it might be answered that the title first descended to his ancestor or predecessor upwards of twenty years before. And this construction was confirmed by the opinion of a majority of the Judges in the case of Stowell *v.* Zouch, (*c*) in which two of the Judges said, that if a tenant in tail was disseised, and the disseissor levied a fine, and five years passed, and afterwards the tenant in tail died, the issue in tail

(*a*) 3 Brod. & Bing. 217. Tit. 29, c. 5. 1 Inst. 15 b. 3 Rep. 41 b. 1 P. Wms. 721. 2 Vez. 634.

(*b*) Tit. 35, 36.

(*c*) Plowd. 374.

should have a new period of five years to make his claim, for a new right came to every one of them *per formam doni.* But this was utterly disavowed by Dyer and Catline, C. J., and all the other Judges, who said that the word *first*, which ought to be added to the word *descend*, would not suffer every descent to have five years.

As the words of the Statute of Fines, 4 Hen. VII., upon *which the above opinion of the majority of the Judges *434 was founded, were nearly similar to those of the statute 21 Jac. I., it might be fairly presumed, that the Judges would now adopt this reasoning; and give the same effect to the words *first descended*, in the stat. 21 Jac. I. as in the Statute of Fines. (*a*) †

[Since the preceding observations were written, the case of Tolson *v.* Kane, has decided that the twenty years, within which a *formedon* in the *descender* ought to be brought under the stat. 21 Jac. I. c. 16, begin to run when the title descends to the first heir in tail, unless he be under disability.] (*b*)

13. The word *fallen*, in the stat. 21 Jac. I., is clearly applicable to estates in remainder and reversion; and it has been always held that writs of *formedon* in remainder and reverter may be brought at any time within twenty years after the determination of the preceding estate tail, though such preceding estate tail should have continued for centuries; because by such determination, the title and action *first descended* and fell.

14. It is enacted by the statute 21 Jac. I. c. 16, "that no person or persons shall at any time thereafter *make any entry* into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title, which should thereafter first descend or accrue to the same; and in default thereof such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made." (*c*) ‡ [1]

(*a*) Tit. 35, c. 11. (*b*) 3 Brod. & Bing. 217.
(*c*) Widdowson *v.* Earl of Harrington, 1 Jac. & Walk. 532.

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† [In Cottrell *v.* Dutton, 4 Taunt. 826, Mr. J. Heath held, that there was no such difference between the issue in tail and other heirs as was supposed. *Note to former edition.*]

‡ [By stat. 3 & 4, Will. 4, c. 27, s. 2, it is enacted, that after the 31st day of Dec. 1833, no person shall make an entry or distress, or bring an action to recover any

[1] The periods of limitation in the United States are exceedingly various, and within the last fifteen years have been essentially changed in several of the States, in the

land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action shall have first accrued to the person making or bringing the same. The next section explains when rights shall be deemed to have accrued in the following words: "That in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned, (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person, who shall have continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and shall have been the last person entitled to such estate or interest, who shall have been in such possession or receipt, then such right shall be deemed to have first accrued of the time of such death; and when the person, claiming such land or rent, shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured, by any instrument, (other than a will,) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest in the possession or receipt of the profits of the land or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt, by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken.]

recent revisions of their statutes; the tendency of legislation being more and more towards the establishment of an uniform period of twenty years, for all real actions and rights of entry. But a particular statement of these provisions would be but a useless incumbrance to this work, especially as the rules are hardly yet universally settled. For the sake of general information, however, a tabular view of the law on this subject has been appended to this chapter; the student being referred, for exact knowledge, only to the statutes themselves. [In the Texas statute, it is not required that the same person shall continue in the adverse possession for the whole period, (three years,) but a holding by two or more persons, successively in privity under the same color of title for more than three years, is a good bar. Christy *v.* Alford, 17 How. U. S. 601.

When title by prescription is not complete when the law is changed altering the period, the past time is effaced, and the substituted law determines the time which bars the recovery. Nickles *v.* Haskins, 15 Ala. 619.]

15. * Under this clause all persons must enter within *435 *twenty years after their title accrues;* and all those who are entitled to estates tail in remainder, or to reversions in fee simple expectant on the determination of estates tail, must enter within *twenty years after the determination* of such estates tail; because their title first accrues by such determination.†

16. An entry can only be made where there is an existing *right of possession;* for where that is lost, the right of entry is gone. Thus, where an estate tail was discontinued,‡ the estates in remainder, and the reversion expectant thereon, were devested; and the issue in tail, as also the persons entitled to the estates in remainder, and to the reversion, were barred of their entry, but not of their real action. (*a*)

17. A right of entry might also be *destroyed by a descent,* ‖ unless the heir labored under any of the disabilities which will be mentioned hereafter. But by the stat. 32 Hen. VIII. c. 33, it is enacted, that a descent from * a disseisor shall *436 not have that effect, unless he had been in peaceable possession for five years next after the disseisin. (*b*) [1]

18. Lord Coke says, this statute does not extend to any feoffee or donee of the disseisor, mediate or immediate; and that abators and intruders are out of it, because it is penal. It followed, that the descent of an estate from an abator or intruder to his heir, took away the entry of the person having right, and put him to his real action. (*c*)

If a person seised of lands in fee, devised the same to a stranger in fee, and died, by which the freehold in law was cast upon the devisee, and the heir of the devisor entered and died seised, this descent should not take away the entry of the devisee; for, as Lord Coke observes, he would then be utterly without

(*a*) Tit. 29, c. 1, s. 6. Tit. 2, c. 2.
(*b*) Lit. s. 385. Tit. 29, c. 1, s. 7, note. 1 Inst. 111 a, 240 b. Carter *v.* Tash, 1 Salk. 241.
(*c*) 1 Inst. 256 a. Id. 238 a.

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† [See the conclusion of section 3, of stat. 3 and 4 Will. 4, c. 27, and sec. 5, Ib.]

‡ [By the 39th section of the above act, it is enacted, That no descent cast, discontinuance, or warranty, which may happen, or be made after the 31st day of Dec. 1833, shall toll or defeat any right of entry or action for the recovery of land.]

‖ [Ib.]

[1] This provision of the statute has been adopted and acted upon in Massachusetts, from the earliest times. Emerson *v.* Thompson, 2 Pick. 473, 489.

remedy. But he must enter within twenty years, because a writ of right did not lie for a devisee. (*a*)

19. It is laid down by Mr. Serjeant Williams, that an actual entry is not required to avoid the Statute of Limitations; for if *an ejectment* be brought *within twenty years*, no previous actual entry seemed necessary. (*b*) †

20. In consequence of the statute 21 Jac. 1, a *peaceable possession for twenty years* takes away the right of entry of all persons who are not within the savings of the act; and in such case a release of all actions, from the person entitled to the right of property, will create a good title; for no writ of right can be maintained for the fee simple after such a release. (*c*)

21. An uninterrupted possession for twenty years not only gives a right of possession which cannot be devested by entry, but also *gives a right of entry.* So that if a person who has such a possession is turned out of it, he may lawfully enter, and bring an ejectment for its recovery; upon which he will be entitled to judgment. Thus, a possession for twenty years, in this case, forms a positive prescription. (*d*)

22. The [former] Statutes of Limitation never ran against any person, unless he was *actually ousted or disseised.* Thus it was laid down in a case respecting the Statute of Fines, which 437 * is in * fact a Statute of Limitation, that he who had the estate or interest in him could not be put to his action, entry, or claim: for he had that which the action, entry, or claim, would vest in or give him. And it was not only necessary that the person should be out of possession, but it was also necessary that the possession should be adverse to, and inconsistent with, the title of the claimant. (*e*) ‡

23. Where a person has conveyed away the legal estate in lands to a *trustee for himself*, for any particular purpose, and

(*a*) 1 Inst. 240 b. Doe *v.* Danvers, *infra.* (*b*) Tit. 1, s. 23. 1 Saund. R. 319, n.
(*c*) Jenk. 16. (*d*) Stocker *v.* Berny, 1 Ld. Raym. 741. 2 Salk. 421, 685.
(*e*) Tit. 35, c. 13. Doe *v.* Reed, 5 Barn. & Ald. 232. Doe *v.* Pike, 8 B. & Adol. 738.

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† [By sect. 10, stat. 3 & 4 Will 4, c. 27, it is enacted that no person shall be deemed to have been in possession of any land within the meaning of that act, merely by reason of having made an entry thereon; and by section 11, that no continual or other claim upon, or near any land, shall preserve any right of making an entry or distress, or of bringing an action.]

‡ [See sections 20, 21, 22, 23, 24, of statute 3 & 4 Will. 4, c. 27.]

continues to hold the possession, he becomes tenant at will to such trustee; and his possession not being adverse to the title of the trustee, the Statute of Limitations will not operate in such a case. (*a*) †

24. *Joint tenants, coparceners,* and *tenants in common,* having a joint possession and occupation of the whole, [previously to the late Statute of Limitations,] it was settled that the *possession of any one* of them was the *possession of the others,* or other of them, so as to prevent the Statutes of Limitation from affecting them; nor would the bare perception of all the rents and profits by one operate as an ouster of the other. (*b*) ‡ [1]

25. In ejectment, on a trial at bar, the Statute of Limitations was insisted on; but it was ruled by the Court that the possession of one joint tenant was the possession of the other, so far as to prevent the Statute of Limitations. The same point was determined as to coparceners, in the case of Davenport *v.* Tyrrel, and as to tenants in common, in the case of Fairclaim *v.* Shackleton, which has been already stated. (*c*)

26. A person being seised in fee, having two daughters, devised his lands to his grandson, by his eldest daughter, in fee. The grandson died without issue. The heir of the grandson and the heir of the coparcener entered into the land, and took the profits by moieties, for twenty years together, upon the supposition that the devise was void for a moiety. The mistake being

(*a*) Keene *v.* Deardon, 8 East, 248.
(*b*) *Vide* tit. 18, ch. 1, § 26. Tit. 19, § 7. Tit. 20, § 14. 3 & 4 Will. 4, c. 27.
(*c*) Ford *v.* Grey, 1 Salk. 285, 6 Mod. 44. Tit. 19, § 9. Tit. 20, § 16.

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† [See section 25 of the same statute.]

‡ [But now by the 12th section of the act it is enacted, that the possession of one or more of several coparceners, joint tenants, or tenants in common, shall not be deemed the possession of the others.]

[1] But the disability of one tenant will not save the statute as to his co-tenants; for the privilege given by the statute is personal. And if the action is in its nature joint, and it is barred as to one party, it is barred as to all. Bryan *v.* Hinman, 5 Day, 211; Marsteller *v.* McClean, 7 Cranch, 156; Perry *v.* Jackson, 4 T. R. 516; Doe *v.* Barksdale, 2 Brock, 436; Angell on Limitations, 529, 530. [But see Sturges *v.* Longworth, 1 Ohio State R. 544.] In several of the United States, all joint owners of land are permitted to sue for the recovery of possession severally or jointly, at their election. Whether, in the case of a technical joint tenancy, the demise of the party disabled, may be regarded, in an ejectment, as a severance of the joint estate, converting it into a tenancy in common, *quære;* and see Ang. on Lim. *supra.* See, further, Caldwell *v.* Black, 5 Ired. 463; McRee *v.* Alexander, 1 Dev. 321; Moore *v.* Armstrong, 10 Ohio, R. 11. [Larman *v.* Huey, 13 B. Mon. 436.]

discovered, the heir of the grandson brought an ejectment against the heir of the other coparcener. Upon a special verdict, 438 * it was * objected, that the bringing the ejectment against the heir of the coparcener for this moiety, admitted the plaintiff to be out of possession for twenty years, and then he was barred by the Statute of Limitations. (*a*)

The Court, however, laid it down, that the Statute of Limitations never runs against a man, but where he is actually ousted or disseised; and true it was, one tenant in common might disseise another; but then it must be done by actual disseisin, and not by bare perception of the profits only.†

27. Where lands are held by the rector of a parish, as a compensation for tithes, this will not be considered as an adverse possession.

28. In ejectment, a verdict was found for the plaintiff, subject to the opinion of the Court, whether the plaintiff's right of recovery was not barred by the Statute of Limitations. The lessors of the plaintiff, who were lords of the manor of Beddington, in Surrey, sought to recover the lands as parcel of the manor, against the defendant, who was rector of the parish, and claimed them as parcel of the rectorial glebe. The lords of the manor had a right of presentation to the rectory, and were also entitled to a portion of the tithes. At various times there had been a mutual exchange of lands and tithes between the lords of the manor and the rectors, which had given rise to much confusion concerning their respective rights. To prove possession in the lessors of the plaintiff, a deed was produced, dated in 1703, by which the then lord of the manor demised to the rector the lands in question for forty years, reserving a certain rent; and the rector covenanted with the lessor, that he and his heirs should have the tithe of oats of the parish. The rectors continued to hold the possession after the expiration of the lease, but withheld the rents for upwards of twenty years; the lords of the manor continued to take the tithe of oats. (*b*)

The Court was of opinion, that possibly, at the time when the rent was withheld, it was agreed between the then rector and the lord of the manor, that if the latter were permitted to receive the

(*a*) Reading *v.* Royston, 2 Salk. 423. (*b*) Roe *v.* Ferrars, 2 Bos. & Pull. 542.

† [See note (‡), section 24, *supra*.

tithe as before, the former should be permitted to retain the land demised; therefore that the possession of the land by the rector was not adverse, so as to let in the operation of the Statute of Limitations. (*a*)

*29. Where there is *a valid existing lease*, the right of *439 entry is *postponed* till such lease is determined; because the right to the possession first descends or accrues upon the determination of the lease. Nor is the plaintiff, in such case, obliged to show that he has received any rent on the lease. (*b*) †

30. In ejectment for lands at Deptford, in Kent, the lessor of the plaintiff claimed the estate as heir at law to John and Edmund Walthew, who had granted long leases of the premises, reserving rent. The leases expired in 1789, on which one Elizabeth Ellerbeck had entered in the name of herself and the lessor of the plaintiff; and Mr. Maddox, the defendant, had brought an ejectment, claiming not only by an assignment of the lease, under which he had got into possession, but also by a conveyance of the reversion by lease and release, from the heirs of Dame Elizabeth Blundell; who, he stated, was the heir of John and Edmund Walthew. Maddox recovered the premises at Maidstone in 1791; and Mrs. Ellerbeck, being thrown into gaol for the costs, died there; but her sister made an entry, and brought an ejectment; which was tried before Mr. Baron Hotham at Maidstone, in 1794, where she proved her right, as heir of John and Edmund Walthew. (*c*)

For the defendant it was objected, that supposing the pedigree sufficiently proved, as there was a rent reserved on the leases, the lessor of the plaintiff was bound to show that she herself, or some of the ancestors from whom she derived her title and descent, had received the rent within twenty years previous to the commencement of the action; and the Judge, thinking *that* was

(*a*) *Vide* Doe *v.* Perkins, tit. 35, c. 14.

(*b*) (Jackson *v.* Schoonmaker, 4 Johns. 390. Jackson *v.* Sellick, 8 Johns. 262. Wells *v.* Prince, 9 Mass. 508. Wallingford *v.* Hearl, 15 Mass. 471.)

(*c*) Orrell *v.* Maddox, Runn. Eject. App. No. 1, p. 458, ed. 1795.

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† [But by the 9th section of 3 & 4 Will. 4, c. 27, the right of the person entitled to the land, to make an entry or distress, or to bring an action, shall be deemed to have first accrued at the time at which the rent, (of twenty shillings or upwards,) reserved by such lease, was first received by the person wrongfully claiming; and no right shall be deemed to have first accrued, upon the determination of such lease, to the person rightfully entitled. See also sections 7 and 8 of the above act.

necessary to prove a possessory title, the rent being in lieu of the land, considered the objection as fatal, and upon it nonsuited the plaintiff.

Mr. Serjeant Bond (from whose manuscript this case was taken) moved to set aside the nonsuit. He said it was a
440* general *question, whether a person, seised of a reversion, expectant on a term for years, was bound, in order to entitle himself to recover in ejectment, to show, *as part of his case*, that he had actually been possessed, within any particular limits, of the rents reserved upon the leases. It would be admitted that if nothing was reserved, he could not be expected to show that any thing was received; but as fealty was at least the implied service in all tenancies, if no rent, the party must show he had received fealty; or if a pepper-corn was only reserved, he must prove seisin of it. Nothing of this was to be found in the Statute of Limitations, 21 Jac. I.; that alone could have given birth to this rule, which only directed that the entry must be made within twenty years after the title accrued; and as ejectment only lay where the title of entry was found, it could only be brought within twenty years. Here the leases expired in 1789; consequently, the ejectment being brought within twenty years after the title accrued, the statute was satisfied. He concluded that all reference or analogy to this statute was false, and there was no rule of law which authorized the defendant's objection. If the rent had not been received, the same statute had taken away the remedy by action of debt, after six years, but not the right. The right remained to the rent; and, according to Foster's case, the old Statute of Limitations did not apply to a rent reserved by deed. The fact of payment was not a requisite or direct point to be proved in this action; he did not undertake to make out that he was entitled to the rent; he only was to show he was entitled to the possession, the term being elapsed.

In real actions, sometimes esplees were part of the demandant's case, as in a writ of right; but in others, as in *cessavit*, or escheat, where they claimed a seigniory or reversion, none were alleged. The non-receipt of rent in that line of descent, in which plaintiffs claimed, might operate as a consideration or presumption for the jury to go on, and lead them to suppose the right was not in the plaintiff; but if the defendant had shown

this, the plaintiffs might have rebutted such a presumption by evidence in reply. But, at all events, not receiving the rent was only a question for the jury, and could not warrant a nonsuit as if it was as necessary a requisite, as proof of a conversion in trover, or of esplees in a writ of right. (*a*)

* The Court set aside the nonsuit, Lord Kenyon going *441 very much on Bond's argument.

31. Thomazine Taylor being tenant in fee simple of a customary estate held of the manor of Stepney, demised the same to D. Whiting for forty-one years, with a proviso for reëntry on non-payment of the rent. The lessor died in 1780, and in 1782 Thomas Danvers was admitted as her heir to the said premises. The plaintiff claimed under the will of T. Taylor; but though the testatrix died in 1780, and the will was established in 1782, yet owing to the lease, which did not expire till June, 1800, the devisee did not enter or bring an ejectment till Hil. Term, 1802; but suffered the heir at law of the testatrix, who was admitted to the premises, and afterwards the defendant his son, to whom they descended in 1791, to take the rent during the intermediate time; and this, though there was a proviso in the lease for reentry in case of non-payment of rent. (*b*)

It was contended on behalf of the defendant, that, taking this to be freehold, the lessor of the plaintiff was barred by his laches; and it was no answer to say that the outstanding lease, which continued to run till midsummer, 1800, prevented his entry before; for it was still competent to him to have entered, without committing a trespass; as to demand rent or fealty, or to obtain seisin of the freehold.

* On the part of the lessor of the plaintiff, it was insisted *443 that no other right or title of entry was within the Statute of Limitations, except that which was accompanied by a right of possession, which the lessor could not have, pending the lease; and the payment of the rent, during part of the time, to the defendant and his father, would not of itself make the holding of the tenant wrongful; but it still continued legal under the original term, as the lessor was not bound to take advantage of the forfeiture, and reënter for the condition broken. The Court was of this opinion, and gave judgment for the plaintiff. (*c*)

(*a*) Bro. Ab. Esplees, 5. (*b*) Doe *v.* Danvers, 7 East, 299.
(*c*) See Bushby *v.* Dixon, 3 Bar. & Cress. 298, 304–5.

32. But if a lease were *void*, or considered as *a trust* for the person entitled to the inheritance, it would *not*, in that case, *postpone the right of entry.* (*a*)

33. By an indenture of settlement made in the year 1668, the estates in question were limited to the use of Sir Robert Atkyns the elder, for life, remainder to Sir R. Atkyns the younger, and the heirs male of his body by his then intended wife, remainder to the right heirs of Sir R. Atkyns the elder; with a power to Sir R. Atkyns the elder, and Sir R. Atkyns the younger, when they should be respectively in possession, to demise the said premises to any person or persons, for one, two, or three lives, reserving the usual rents; and also a power to Sir R. Atkyns the father, to limit the premises to the use of any woman he should marry, for her life, by way of jointure. Sir R. Atkyns the father, in 1681, made an appointment of the premises by way of jointure to Ann Dacres for her life, and soon after married her. (*b*)

Sir R. Atkyns the father, by indenture dated in 1698, under his hand and seal, attested by three witnesses, and made between himself of the one part, and Thomas Dacres, R. Dacres, and J. Dacres, of the other part, reciting his power of leasing, in consideration of the rent reserved, and in pursuance of the said power, demised the premises to Thomas Robert and John Dacres, and their assigns, for and during their natural lives, and the life of the longer liver of them, reserving a yearly rent of £360, in which lease was contained the following
444* clause:—* "The true intent and meaning of this estate or term for lives, so hereby granted and made to the said Thomas Dacres, R. Dacres, and J. Dacres, and the survivor of them, being to preserve the said remainder so limited in the premises, by the said recited indenture, to the right heirs of the said Sir Robert Atkyns the father, and to such person or persons to whom the said Sir Robert Atkyns shall any way dispose of the same, from being barred by any recovery to be suffered, or by any other act to be attempted or done, for the barring of the same."

John Dacres alone executed a letter of attorney, reciting the said lease, and empowered Thomas Barker to take livery of the premises from Sir Robert Atkyns the father, for himself and for

(*a*) See sect. 29, *supra*, note. (*b*) Taylor *v.* Horde, 1 Burr. 60.

Thomas and Robert and every of them, in their names, and for their use, according to the purport of the said indenture; and to enter and take possession of the said premises, to the use of them, and every of them.

Sir R. Atkyns delivered seisin of the premises to Barker, to the use of Thomas, Robert, and John Dacres; but the lessees were never in possession of the premises otherwise than by the said livery; nor did they ever receive or pay any rent, in respect of the said premises; and the lease was not found in the custody of Thomas Dacres, the surviving lessee, at the time of his death.

Sir R. Atkyns the father made his will in 1708, whereby he devised his reversion in fee in the premises in question, and also the lease made to the Dacres, to John Tracy, the lessor of the plaintiff, who afterwards took the name of Atkyns, in tail, with several remainders over; and died in 1709, whereupon his widow entered on the premises, claiming the same for her life as her jointure.

Sir R. Atkyns the younger brought an ejectment against his father's widow, for the recovery of the premises in question; when a verdict was found for the plaintiff, and judgment entered up accordingly. Soon after which, Sir Robert Atkyns the son entered into and was in possession of the premises, and by feofment conveyed the same to a tenant to the *præcipe*, and suffered a common recovery.

Sir R. Atkyns continued in possession till November, 1711, when he died without issue male.

Robert Atkyns, who was nephew and heir at law of Sir R. * Atkyns, the son, entered into the premises, upon the *445 death of Dame Ann Atkyns, the widow of Sir R. Atkyns, the father, who had recovered the premises in ejectment, as her jointure.

Robert Atkyns died in possession, in 1753; and Thomas Dacres, the survivor of the three persons named in the lease, died in 1752.

John Atkyns, the lessor of the plaintiff, never was in possession of the premises till 1752, when he entered, claiming as devisee under the will of Sir Robert Atkyns the father, and demised to the plaintiff.

Two great questions arose upon this case: 1st. Whether the recovery was good. 2dly. Whether, supposing the recovery was bad, the plaintiff was barred by the Statute of Limitations.

The Court of King's Bench being of opinion that the recovery was bad, it then became necessary to determine whether the lessor of the plaintiff had made an entry within twenty years after his title accrued; for otherwise he was barred of his remedy by the Statute of Limitations. (*a*)

Lord Mansfield delivered the opinion of the Court. He said, an ejectment was a possessory remedy, and only competent when the lessor of the plaintiff might enter; therefore it was always necessary for the plaintiff to show that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by the statute. Twenty years' adverse possession was a positive title to the defendant. It was not a bar to the action, or remedy of the plaintiff only, but took away his right of possession. Every plaintiff in ejectment must show a right of possession, as well as of property; therefore the defendant need not plead the statute as in the case of actions. The question then was, whether it appeared that the lessor of the plaintiff might enter when he brought the ejectment. Sir R. Atkyns died, without issue male, in 1711, and in 1712, Lady Atkyns the jointress, died. Then accrued the title of the lessor of the plaintiff; his only excuse for not entering was, that he was prevented by the lease to the three Dacres. Then, upon the death of Thomas Dacres, the surviving lessee, in 1752, a new title of entry accrued, upon which he entered and brought his ejectment. Three answers were given, any one of which, if well founded, was sufficient.

1. That the lease was absolutely void, and of no effect.

446* 2. If *good, it determined by the estate tail being spent, by the express tenor of the demise. 3. If subsisting, yet upon the extinction of the estate tail, it was a trust to attend the inheritance in the lessor of the plaintiff, and made part of his title deeds; therefore could not stop the statute's running to protect an adverse possession, nor give him any new right of entry.

1. That the lease was void. Sir R. Atkyns the father, being

(*a*) *Vide* tit. 36, c. 2.

only tenant for life, could, by virtue of his ownership, make no estate to continue after his death; this lease, therefore, after his death, could only be supported by his power, if it was made pursuant to it. It was no lease at all; the very definition of a lease was, a contract between landlord and tenant, by which both were bound in mutual stipulations. It professed being made by Sir R. Atkyns, on the one part, and the three Dacres, on the other part, but it was not; the Dacres were not bound, they never executed it, or any counterpart. It did not appear they knew or consented to the making of it. The deed never was out of Sir R. Atkyns's own possession. It was not found that the best rent was reserved, nor was there a covenant for payment of the rent. (*a*)

2. Supposing this pocket undelivered grant of the ideal incorporeal freehold a good execution of the power, it was argued that it determined with the estate tail; the only cause of the grant being, to preserve the reversion during the estate tail, which qualified the grant, and amounted to a limitation; there being no technical words necessary to express a contingency upon which an estate for lives might sooner determine. The deed might have said expressly, "If the heirs male of Sir Robert Atkyns, the son, continue so long," or, "that the lease should determine if, during the lives, the estate tail should be spent:" and the intent of the deed, plainly expressed, was tantamount.

3. Suppose it subsisted; it was as a trust, and disposed of as such, to attend the inheritance of the lessor of the plaintiff, which came into possession in 1712, when his title and right of entry accrued. The lease was one of his muniments; a mere weapon in his hands; and it would be going a great way to say that such a form should take from an adverse possession the benefit of the statute. But the Court was clear, that at the trial a surrender of such a lease might and ought to be presumed, *to let in the Statute of Limitations. The special *447 verdict not having found such surrender, the Court could not come at the justice of the case in that shape. It was unnecessary to go into that point, or the former; and it would be very improper unnecessarily to do it. If the Dacres had no estate

(*a*) *Vide* tit. 32, c. 15.

by virtue of the demise in 1712, then the ejectment was not brought within twenty years after the lessor's title accrued; and no facts were found to excuse him within any of the exceptions. Therefore the Court was unanimously of opinion, that there should be judgment for the defendants.

A writ of error was brought into the House of Lords; and the Judges being ordered to attend, the following question was proposed to them:—"Whether sufficient appeared by the special verdict in this case, to prevent the lessor of the plaintiff, by force of the Statute of Limitations of the 21st of King James the First, from recovering in the ejectment?" Whereupon the Lord Chief Justice Willes, having conferred with the rest of the Judges, delivered their unanimous answer,—"That sufficient did appear by the special verdict in this cause to prevent the lessor of the plaintiff, by force of the Statute of Limitations of the 21 Jac. I., from recovering in the ejectment." Whereupon the judgment of the Court of King's Bench was affirmed. (*a*)

34. Where a person *acquires a new right*, he is allowed a *new period of twenty years* to pursue his remedy; though he has neglected the first. It being a maxim of law, *Quando duo jura in unâ personâ concurrunt, æquum est ac si essent in diversis.* (*b*) †

35. A tenant in tail of lands, held in ancient demesne, conveyed them by fine, in the court of ancient demesne, to
448 * three * persons for their lives. He afterwards levied another fine of the reversion, in the same court, to the use of himself and his heirs. (*c*)

(*a*) 6 Bro. P. C. 633. (*b*) Plowd. 368.
(*c*) Hunt *v.* Bourne, 1 Salk. 339. 2 Salk. 421.

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† [By stat. 3 & 4 Will. 4, c. 27, s. 20, the law is now altered, for it is thereby enacted, that when the right of any person to make an entry or distress, or bring an action to recover any land or rent, to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time, during the said period, have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action, shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the mean time such land or rent shall have been recovered by some person entitled to an estate, interest, or right, which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.]

It was determined, that the first fine created a discontinuance of the estate, and took away the entry of the issue in tail, during the lives of the three persons to whom the first fine was levied, but that the second fine did not make any discontinuance: therefore, although the issue in tail had neglected to bring his *formedon* within twenty years after the death of his ancestor, when his right first accrued, yet when the last life dropped, the discontinuance was determined, and the heir acquired a new right of entry; for the pursuit of which he was allowed by the statute 21 Jac. I. a new period of twenty years: for when a person has a right, and several remedies, the discharge of one is not the discharge of the other; and the word *right* in the statute means a right of entry.

Upon a writ of error in the House of Lords, it was contended for the plaintiff—1. That the fine did not create a discontinuance, the consequence of which was, that the right of entry of the issue in tail commenced immediately on the death of the tenant in tail, which happened in 1663, above twenty years before the issue entered; therefore, his entry was barred by the Statute of Limitations. (*a*)

2. That the discontinuance, if any, did not determine with the estate for three lives, but still continued to bar the entry of the issue in tail, by the common law; because a fee passed by the first fine to the cognizee, therefore the discontinuance was of the whole fee: but if the first fine alone did not work a discontinuance in fee, yet the second fine and warranty did, in order that the warranty might be preserved.

3. That the entry was barred by the Statute of Limitations, which enacted, that no person should enter into lands but within twenty years after his right or title should first descend or accrue. In this case, the first right or title that descended was a right of action, viz., to a *formedon*, which accrued to the issue immediately on the death of the tenant in tail, which happened above thirty-five years before; and the issue having neglected for above twenty years to sue for the estate, was thereby barred, not only of his action, but of his entry also; for otherwise, a man might enter into lands when he had no way by law to recover them, *having lost that remedy by his own default; *449

(*a*) 4 Bro. Parl. Ca. 66. *Vide* tit. 35.

which would be absurd and inconvenient, with respect to purchasers, and the disturbance of long possessors.

On the other side it was contended, that the only question in the case was, whether the lessor of the plaintiff might lawfully enter, after the determination of the estate for three lives, granted by the first fine; for it was not pretended that a fine, levied in a court of ancient demesne, would bar an estate tail; that the first fine made a discontinuance of the estate, and took away the entry of the tenant in tail, during the lives of the lessees only; but that the grant of the reversion by the second fine did not make a discontinuance in fee; consequently, when the last life dropped, in 1693, the discontinuance was determined, and the right of entry revived; therefore, the issue in tail might lawfully enter, and was not barred by the Statute of Limitations, his right not accruing till 1693. The judgment was affirmed.

36. It is said by Lord Hardwicke, that a *remainder-man* expectant on an estate for life or years, to whom a *right to enter*, or bring an ejectment, is *given by the forfeiture* of the tenant for life or years, is *not bound to do so;* therefore, if he comes within his time, after the remainder attached, it will be good; nor can the Statute of Limitations be insisted on against him, for not coming within twenty years after his title first accrued by the forfeiture. (*a*) †

(*a*) Kemp *v.* Westbrook, 1 Vez. 278. *Vide* tit. 35, c. 11.

[† By sect. 4 of the stat. 3 & 4 Will. 4, c. 27, it is enacted, that when any right to make an entry or distress, or to bring an action to recover land or rent, by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued, in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened. And by sect. 5, it is provided, that a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates, in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent. See, also, §§ 6, 7, 8, 9. By sect. 20, it is enacted,

*37. The manner of making an entry has been already *450
stated; it has also been resolved, that *in proving an entry* or claim, to avoid the Statutes of Limitation, it is necessary to produce evidence of its having been made *upon the lands claimed*, unless there be a special reason to the contrary; and also that

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that when the right to an estate in possession is barred, the right of the same person to future estates shall also be barred. By sect. 21, it is enacted, that when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred. By sect. 22, it is enacted, that when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred, shall make an entry or distress, or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress, or brought such action. And by sect. 23, it is enacted, that when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall, by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever, (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail,) shall continue or be in such possession or receipt, for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail, if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid; then at the expiration of such period of twenty years, such assurance shall be, and be deemed to have been effectual, as against any person claiming any estate, interest, or right, to take effect after or in defeasance of such estate tail. The above act extends to spiritual courts, but not to Scotland, nor to advowsons in Ireland, §§ 43, 44.

It appears doubtful whether the 22d section of the above act will fully answer the purposes for which it is presumed to have been framed. Its effect may be thus illustrated: Suppose a limitation to A for life, remainder to B in tail, with remainders over, and a fine levied by B in 1820: A dies in 1830; twenty years' possession from the death of A in 1830, by virtue of this clause, will not, it would seem, bar the remainders expectant on B's estate tail; for a *fine* then levied (i. e. at A's death in 1830,) would not have had the effect of barring the remainders. But if a recovery had been suffered by B in 1820, without the concurrence of A, it would come within this clause, for at the death of A, in 1830, B might by *recovery*, have barred the remainders over.]

451 * it was * *not a casual entry*, but made *animo clamandi.*[1]

If, however, a person was *prevented by force* or violence from entering on lands, he must then make his claim *as near them as he can*, which in that case will be as effectual as if he had made an actual entry. (*a*)

38. If a person, having a right of entry into a freehold estate, *enters upon part of it*, such entry will be adjudged good for all possessed by one tenant: but where there are *several tenants*, there must be *entries on each of them.* A special *entry into a house*, with which lands are occupied, *claiming the whole*, is however a good entry as to the lands. (*b*)

39. On a special verdict, the single question was, whether the entry of *cestui que trust* would be sufficient to avoid the Statute of Limitations of 21 Jac. I. It was held clearly by the whole Court, that such entry was sufficient to avoid the statute; and that they would not hear argument on the point. (*c*)

40. It is enacted by the statute 4 Ann. c. 16, s. 16, that no claim or entry to be made of or upon any lands, tenements, or hereditaments, shall be sufficient within the Statute of Limitations of 21 Jac. I., unless upon such entry or claim *an action* shall be *commenced within one year* after the making of such entry or claim, and be prosecuted with effect.[2]

41. By the statute 21 Jac. I. c. 16, s. 2, it is provided, "that if any person or persons that shall be entitled to such writ or writs, or that shall have such right or title of entry, shall be, at the time of the said right or title first descended, accrued, come, or fallen, *within the age of twenty-one years*, *feme covert*, *non compos mentis*, *imprisoned*, or *beyond the seas*,[3] that then such person

(*a*) Tit. 1, § 23–30, (Ford *v.* Grey, 1 Salk. 285, 6 Mod. 44.) See stat. 3 & 4 Will. 4, c. 27, s. 10. *Supr.* p. 447.

(*b*) 1 Lill. Ab. 516.

(*c*) Gree *v.* Rolle, 1 Ld. Raym. 716.

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[1] Jackson *v.* Schoonmaker, 4 Johns. 390; Doe *v.* Danvers, 7 East, 311, per Lawrence, J.; Robison *v.* Swett, 3 Greenl. 316; 1 Inst. 245 b; Clerke *v.* Pywell, 1 Saund. 319, and note (1) by Williams. *Ante*, tit. 1, § 23–30.

[2] This provision is found in the statutes of limitation, in *Massachusetts*, *Connecticut*, *New York*, *Michigan*, *Missouri*, and *Arkansas*. But in *Massachusetts* and *Michigan*, open and peaceable possession, continued for a year after the entry, has the same effect as the commencement and prosecution of an action.

[3] The disabilities of *infancy*, *insanity*, or *unsoundness of mind*, and *coverture*, are recognized in the statutes of limitation of real actions in all the United States; and the

and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action or make his entry, as he might have done before this act; so as such person and persons, or his or their heir or heirs, shall, *within ten years* next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years.

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protection afforded to the rights of persons thus disabled, is everywhere the same; except the modifications arising from the peculiar jurisprudence of *Louisiana*, where the wife may in certain cases have rights, powers, and liabilities as a feme sole, and may therefore be barred as such. [Coverture is not a saving against the operation of the Statute of Limitations unless the wife *must* be joined with the husband in order to sustain the action. Halford *v.* Tetherow, 2 Jones, Law, (N. C.) 393.]

Imprisonment is recognized as a disability in regard to real actions, in all the States except *New Hampshire*, *New Jersey*, *Pennsylvania*, *Indiana*, *Illinois*, *Mississippi*, *Arkansas*, *Louisiana*, and *Alabama*; but in *New York* and *Missouri* it is restricted to imprisonment upon a criminal charge, or under sentence for crime, for a less period than the term of life.

Absence from the State, is also recognized as a disability in such cases, in all the States except *New Hampshire*, *Vermont*, *Connecticut*, *New York*, *New Jersey*, *Pennsylvania*, *Delaware*, *Virginia*, *Ohio*, *Kentucky*, and *Mississippi*. But in *Louisiana* it applies only to the prescription of ten years; and in *Alabama* it does not apply to ancestral actions, though it saves others which are limited to twenty years. In some of the States, absence is not regarded as a disability, by the terms of the statutes, unless the party is "out of the *United States*." Such is the law in *Maine*, *Massachusetts*, *Rhode Island*, *Michigan*, *Tennessee*, and *Indiana*. The statutes of *Florida*, *Illinois*, *Arkansas*, *Louisiana*, and *Alabama*, speak of persons "out of the State." In others, the old expression of "beyond seas" is retained; but this has been held equivalent to the words "out of the State," and such is now the general and established rule of construction. See Faw *v.* Roberdeau, 3 Cranch, 174; Murray *v.* Baker, 3 Wheat. 541; Bank of Alexandria *v.* Dyer, 14 Peters, 141; Whitney *v.* Goddard, 20 Pick. 304; Angell on Limitations, p. 210, 211. But see Ward *v.* Hallam, 2 Dall. 217; Thurston *v.* Dawes, 9 S. & R. 288, *contra*.

In *Maine*, *Massachusetts* and *Michigan*, there is a further exception in favor of a minister or other successor of a sole corporation; who is permitted to sue, notwithstanding his predecessor was disseised and barred by his own laches, provided the suit be brought within five years after the death, removal, or resignation of the predecessor who was disseised.

In *Missouri*, by the act of Feb. 2, 1847, it is further provided, that the time any person may serve as a volunteer in the army of the United States, shall not be taken or counted as any part of the time of limitation.

In *Maryland*, the statute of 21 Jac. 1, c. 16, has been adopted without any legislative act, as the rule of legal limitation to be administered by the Courts. Pancoast *v.* Addison, 1 Har. & J. 350; Martindale *v.* Troop, 3 Har. & McHen. 244. [The statute is not applicable to a claim of one of two administrators against an estate; he cannot sue himself at law. Brown *v.* Stewart, 4 Md. Ch. Decis. 368. By force of the statute adverse possession for twenty years is like a descent at common law, and tolls the entry of the person who had the right. Armstrong *v.* Risteau, 5 Md. 256.]

42. Upon the construction of this clause it has been held, that the disabilities here mentioned must exist at the time when the right first accrues; for *if the time once begins to run*, no subsequent disability will avail. (*a*)[1]

452* 43. *In a modern case, where the ancestor died seised, leaving a son and daughter infants, and on the death of the ancestor, a stranger entered; the son soon after went to sea, and was supposed to have died abroad, within age. It was held, that the daughter was not entitled to twenty years to make her entry, after the death of her brother, but only to ten years; more than twenty years having elapsed in the whole, since the death of the person last seised. (*b*) †

(*a*) Doe *v.* Jones, 4 T. R. 300. Tit. 35, c. 11.
(*b*) Doe *v.* Jesson, 6 East, 80. Cotterell *v.* Dutton, 4 Taunt. 826.

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[1] This point has sometimes been held otherwise; and it is laid down by Mr. Preston, in general terms, that *successive* disabilities, without intermission, will operate as a continuing protection until the statute period after the party is completely habilitated. 2 Preston on Abstracts, 340. See also, the opinion of Reeve, J., in Bush *v.* Bradley, 4 Day, R. 304, 305. But the rule in the text is now well settled, that no disabilities are to be regarded, except such as existed at the time when the right first accrued. Against such, the statute does not run; but it runs over all disabilities which commence afterward. See Demarest *v.* Wynkoop, 3 Johns. Ch. 129, 138–144, where the doctrine is fully reviewed by the learned Chancellor. Eager *v.* The Commonwealth, 4 Mass. 182; Bunce *v.* Wolcott, 2 Conn. 27; Angell on Limitations, p. 522; Doe *v.* Barksdale. 2 Brock, 436; Mercer *v.* Selden, 1 How. S. C. R. 37; 1 Peters, 37, S. C.; McFarland *v.* Stone, 17 Verm. 165; Den *v.* Richards, 3 Green. 347; [Thorp *v.* Raymond, 16 How. U. S. 247; Clarke *v.* Cross, 2 R. I. 440; Reimer *v.* Stuber, 20 Penn. (8 Harris,) 458; Hill *v.* Sanders, 4 Rich. 521; Dease *v.* Jones, 23 Miss. (1 Cushm.) 133; Landes *v.* Perkins, 12 Mis. 238.]

† [By the 3 & 4 Will. 4, c. 27, s. 16, it is enacted, that if, at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued according to the meaning of the act, such person shall have been under any of the disabilities hereinafter mentioned, that is to say, infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within *ten* years next after the time at which the person to whom such right shall first have accrued as aforesaid, shall have ceased to be under any such disability, or shall have died, (which shall have first happened.) And by sect. 17 it is provided that no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within *forty* years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disa-

44. Generally *all natural persons*, and *all freehold and leasehold estates in land*, are within the [former] Statutes of Limitation. (*a*) †

*45. Although it has been stated that rents cannot be *453 devested, yet the statute 32 Hen. VIII. required that avowries or conusances for any rent, suit, or service, due by custom or prescription, must have been made within fifty years. (*b*)

46. There are, however, *some persons' estates* and interests that are *not comprehended* within the [former] Statutes of Limitation; and which are therefore not affected by a non-user or non-claim for any indefinite period.

(*a*) Gilb. Ten. 178. (*b*) Tit. 28, c. 2. 2 Inst. 95. See 3 & 4 Will. 4, c. 27, § 1.

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bilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired. And by sect. 18 it is provided that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent, beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.]

† [By the first section of the before-mentioned act (3 & 4 Will. 4, c. 27,) it is enacted that the word "*land*," shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to *tithes*, (other than tithes belonging to a spiritual or eleemosynary corporation sole,) and also to any share, estate, or interest in them, or any of them, whether the same shall be a freehold, or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "*rent*" shall extend to all heriots, and to all services and suits, for which a distress may be made, and to all annuities, and periodical sums of money, charged upon, or payable out of any land, (except moduses or compositions, belonging to a spiritual or eleemosynary corporation sole;) and the *person* through whom another person is said to claim, shall mean any person, by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of *England*, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest, to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors, or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things, as well as one person or thing; and every word importing the masculine gender only, shall extend and be applied to a female as well as a male.]

47. *Ecclesiastical corporations*, and generally all *eccle-*
454 * *siastical* * *persons*, seised in right of their churches, *being restrained* from alienation by several positive laws, are not *quoad* the estates whereof they are seised in right of their churches, within any of the Statutes of Limitation,[1] and, therefore, cannot bar their successors by neglecting to bring actions for recovery of their possessions within the time prescribed by those statutes. But an ecclesiastical person, who is guilty of this neglect, will himself be barred. (*a*) †

455 * *48. It has been stated in sect. 45, that *quit-rents* and other *customary* and *prescriptive rights* are comprised
456 * within the *statute of 32 Hen. VIII.; but Lord Coke lays it down that this act does not extend to a *rent created by deed*, nor to a *rent reserved* upon any particular estate; for, in the one case, the deed is the title, and in the other the reservation. (*b*)

49. A, by deed indented, made a feoffment in fee to B and his heirs, rendering 10*s.* a-year rent to A and his heirs; of which rent the heirs of A had not been seised for forty years. It was determined that they might, notwithstanding, distrain for it; for the statute 32 Hen. VIII. was intended to operate only where the

(*a*) Magdalen Coll. case, tit. 35, s. 18. Plowd. 358.
(*b*) 1 Inst. 115 a. Sup. s. 44, n.

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[1] The general principle is, that where the right to aliene does not exist, the statutes of limitation do not apply.

† [The statute 3 & 4 Will. 4, c. 27, s. 1, extends to bodies politic, corporate, or collegiate; but exceptions are made therein as to tithes, moduses, or compositions, belonging to a spiritual or eleemosynary corporation sole. By sect. 29, it is enacted that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit, to recover any land or rent within such period as hereinafter is mentioned, next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued; that is to say, the period during which two persons in succession shall have held the office or benefice, in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbrances, and such term of six years taken together, shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years, as will with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said 31st day of Dec. 1833, no such entry, distress, action, or suit, shall be made or brought at any time beyond the determination of such period.]

avowant was driven to allege a seisin by force of some old Statute of. Limitation; and that was when the seisin was material, and of such force that it should not be avoided in avowry, although it were by encroachment, as between the lord and tenant. But in the case of reservation or grant of a rent, there the deed is the title, and the beginning thereof appears; no encroachment in that case shall hurt, nor is any seisin material. And this construction stands with the words of the act,—"No man shall make avowry and allege seisin, &c.;" by which it appears that that branch extends only where the avowant ought to allege seisin. But where no seisin is requisite, it is out of the words and intent of the act; for it intends to limit a time for the seisin, which seisin is required by law to be alleged: and not to compel any one to allege seisin, where seisin was not necessary before. (*a*)

50. The *exemption of rent* out of the statute 32 Hen. VIII. should be understood with this *qualification;* that the certainty of the rent should appear in the deed; because otherwise the *quantum* of the rent is no more ascertained by the deed, than if there was not one existing. If therefore the rent is created by reference to something out of the deed, as by reserving such rent as the person reserving pays over, without expressing what that is; and the latter not having commenced by deed, is one of which seisin is the proper proof. In such a case seisin is equally necessary to both rents; consequently, both ought to be equally deemed within this statute. (*b*)

*51. *Bond debts* and other *specialties* were not within *457
the former Statutes of Limitation. But where an action was brought on a bond, and the money did not appear to have been demanded, or any interest paid, for *twenty years*, this amounted to a *presumption* that the bond had been paid. (*c*) †

(*a*) Foster's case, 8 Rep. 64. Moor. 81. W. Jones, 238.
(*b*) 1 Inst. 115 a, n. Collins *v.* Goodall, 2 Vern. 235.
(*c*) 1 Burr. R. 434. Oswald *v.* Legh, 1 Term R. 270. Fladong *v.* Winter, 19 Ves. 196.

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† [By the stat. 3 & 4 Will. 4, c. 27, s. 40, it is enacted, that after the 31st December, 1833, money charged upon land and legacies, shall be deemed satisfied at the end of twenty years, if there shall be no interest paid, or acknowledgment in writing in the mean time. By sect. 41, no arrears of dower are, after the above day, recoverable for more than six years; so also by section 42, no arrears of rent or interest of money, charged upon, or payable out of land, are recoverable for more than six years. By

52. We have seen that at common law *no prescription* could be maintained *against the King;* nor was he bound by the statute 32 Hen. VIII.; and this privilege also extended to the lessees of the Crown. (*a*) [1]

53. Thus where A having a lease from the Crown for ninety-nine years, and being out of possession for more than twenty years, he notwithstanding recovered in ejectment; for A's possession was that of the King, against whom the want of possession could not be legally objected. (*b*)

54. By the statute 21 Jac. I. c. 5, it was enacted, that a quiet and uninterrupted enjoyment, for sixty years before the passing of that act, of any estate originally derived from the Crown, should bar the Crown from any right or suit to recover
458* such *estate, under pretence of any flaw in the grant, or other defect of title. This act, at the time it was made, secured the rights of such as could then prove a possession of sixty years: but, from its nature, was continually diminishing in its effect, and departing from its principle; so that some new

(*a*) (*Ante*, c. 1, s. 10, note.) (*b*) Lee *v.* Norris, Cro. Eliz. 331. Run. Eject. 59.

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stat. 3 & 4 Will. 4, c. 42, s. 3, (14 Aug. 1833,) it is enacted that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt, or *scire facias* upon any recognizance, and also all actions of debt upon any award, where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias,* and all actions for penalties, damages, or sums of money given to the party grieved, by any statute then or thereafter to be in force, that should be sued or brought at any time after the end of the then session of parliament, shall be commenced and sued within the time and limitation thereinafter expressed, and not after; namely, the said actions of debt for rent upon an indenture of demise, or covenant, or debt upon any bond or other specialty, actions of debt, or *scire facias* upon recognizance, within ten years after the end of the then session or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of the then session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of the then session, or within six years after the cause of such actions or suits, but not after; provided that nothing therein contained should extend to any action given by any statute, where the time for bringing such action was or should be by any statute specially limited.]

[1] [No statute of limitations affects the commonwealth, not even when it has once begun to run against the owner of forfeited land. Levasser *v.* Washburn, 11 Gratt. (Va.) 572. See also Kennedy *v.* Townsley, 16 Ala. 239; State *v.* Joiner, 23 Miss. (1 Cushm.) 500. Under the Spanish law, forty years uninterrupted possession, gave a title by prescription even against the king. Lewis *v.* San Antonio, 7 Texas, 288.]

law became every day more necessary, to secure the possessions of the subject from the claims of the Crown.

55. It was therefore enacted by the statute 9 Geo. III. c. 16,—"That the King's Majesty, his heirs or successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons, bodies politic or corporate, for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever, (other than liberties or franchises,) or for or in anywise concerning the revenues, issues, or profits thereof, or make any title, claim, challenge, or demand, for or into the same, by reason of any right or title which hath not first accrued or grown, or which shall not hereafter first accrue and grow within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding, as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof; unless his Majesty or some of his progenitors, predecessors or ancestors, heirs or successors, or some other person or persons, bodies politic or corporate, under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim, have or shall have been answered by force and virtue of any such right or title to the same rents, issues, and profits of any honor, manor, or other hereditaments whereof the premises in question shall be part or parcel, within the space of sixty years; or that the same have or shall have been duly in charge to his Majesty, or some of his progenitors, predecessors, or ancestors, heirs or successors, or shall have stood *insuper*, of record, within the said space of sixty years." (*a*) [1]

56. The former Statutes of Limitation only fixed certain

(*a*) Gibson *v.* Clark, 1 Jac. & Wal. 159. See also 2 & 3 Will. 4, c. 100. Attorney-General *v.* Lord Eardley, 8 Price, 39.

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[1] The statutes limiting the time within which real actions may be brought, include suits brought by the State, as well as others, in *Maine, Massachusetts, Vermont, New York, New Jersey, Michigan,* and *North Carolina.* In other States the *nullum tempus* rule is supposed to prevail; it being well settled, that the Statutes of Limitation do not run against a State, unless it is by express enactment. Lindsey *v.* Miller, 6 Peters, R. 666, 673; United States *v.* Hoar, 2 Mason, R. 311, 312; see Angell on Limitations, ch. 5.

periods within which different real and personal actions might be brought in the courts of common law; and therefore *did not extend to suits in equity;* but the limitation of suits being founded in public convenience, and attended with so much utility, 459 * the * *courts of equity have adopted principles analogous* to those established by these statutes, *as positive rules* for their conduct.† [1]

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† [By sect. 24, stat. 3 & 4 Will. 4, c. 27, it is enacted, that after the said 31st day of Dec. 1833, no person claiming any land or rent in equity, shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same, as he shall claim therein in equity. And by sect. 25 it is enacted that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.]

[1] The general doctrine, so often expressed in the older books, that courts of equity, in admitting the lapse of time as a bar to suits before them, act only in their discretion, and in *analogy* to the Statutes of Limitation, is now very much narrowed in its application. For at this day, the statutes are regarded as *binding imperatively* on those Courts, in all cases where the same subject-matter is concurrently cognizable in the courts of common law. See Bank of United States *v.* Daniel, 12 Peters, R. 32, 56. In Hovenden *v.* Ld. Annesley, 2 Sch. & Lefr. 629, 630, Ld. Redesdale thus expressed his opinion: "But it is said that courts of equity are not within the Statutes of Limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered. I think it is a mistake in point of language, to say that courts of equity act merely *by analogy* to the statutes; they act in *obedience* to them. The Statute of Limitations, applying itself to certain legal remedies, for recovering the possession of lands, for recovering of debts, &c. Equity, which in all cases follows the law, acts on legal titles, and legal demands, according to matters of conscience which arise, and which do not admit of the ordinary legal remedies; nevertheless, in thus administering justice, according to the means afforded by a court of equity, it follows the law.

"The true jurisdiction of courts of equity in such cases, is to carry into execution the principles of law, where the modes of remedy afforded by courts of law are not adequate to the purposes of justice, to supply a defect in the remedies afforded by courts of law. The law has appointed certain simple modes of proceeding, which are adapted to a great variety of cases; but there are cases, under peculiar circumstances and qualifications, to which, though the law gives the right, those modes of proceeding do not apply. I do not mean to say that, in the exercise of this jurisdiction, courts of equity may not, in some instances, have gone too far; though they have been generally more strict in modern times. So courts of law, fancying that they had the means of administering full relief, have sometimes proceeded in cases which were

57. Thus Lord Camden has said, that laches and neglect were always discountenanced in equity; and, therefore, from the beginning of that jurisdiction, there was always a limitation to suits. *Expedit reipublicæ ut sit finis litium* was a maxim that had prevailed in Chancery at all times, without the help of an act of parliament. As however the Court had no legislative authority, it could not properly define the time of bar by a positive rule; it was governed by circumstances: but *as often as parliament had limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery had adopted that rule and applied it to similar cases in equity;* for where the legislature had fixed the time at law, it would have been preposterous for equity, which, by its own proper authority, always main-

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formerly left to courts of equity; and, at one period, this also seems to have been carried too far.

"I think, therefore, courts of equity are bound to yield obedience to the Statute of Limitations upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions. I think the statute must be taken virtually to include courts of equity; for when the legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law, and, therefore, it must be taken to have virtually enacted in the same cases a limitation for courts of equity also." See also, the judgment of Ld. Camden, in Smith *v.* Clay, Ambl. 645, but more fully and accurately reported from his own manuscript, in 3 Bro. Ch. Cas. 639, note, (Perkins's ed.); Robinson *v.* Hook, 4 Mason, R. 139, 150; Angell on Lim. ch. 3, p. 24–29; 2 Story, Eq. Jur. § 1520, 1521; Reeves *v.* Dougherty, 7 Yerg. 222; Tiernam *v.* Rescaniere, 10 G. & J. 218. If the party has been guilty of such laches in prosecuting his equitable title, as would bar him if his title were solely at law, he shall be barred in equity. Bond *v.* Hopkins, 1 Sch. & Lefr. 429.

So, where no jurisdiction in equity over the subject existed at the time when the Statute of Limitations was enacted, the remedy subsequently given in equity will be barred by the operation of the statute *proprio vigore*, and not by analogy or the discretion and courtesy of the Court. Farnam *v.* Brooks, 9 Pick. 212, 242.

But in cases exclusively cognizable in equity, the courts administer the same rule, in their discretion; always excepting cases of fraud, recently discovered, and other cases where the bar would be inequitable and unjust. See 2 Story, Eq. Jur., *ubi supra.*

[The Statute of Limitations cannot be applied to technical and continuing trusts, such as those existing between administrators and distributees. Presley *v.* Davis, 7 Rich. Eq. (S. C.) 105; White *v.* White, 1 Md. Ch. Decis. 53; Thomas *v.* Brinsfield, 7 Geo. 154; Tinnen *v.* Mebane, 10 Texas, 246.

In all cases of concurrent jurisdiction at law and in equity, the Statute of Limitations is equally obligatory in each Court. Hertle *v.* Schwartze, 3 Md. 366; Crocker *v.* Clements, 23 Ala. 296.

The Statute of Limitations of Indiana does not run against an equitable title to land. Baird *v.* Wolfe, 4 McLean, 552.]

tained a limitation, to countenance laches beyond the period to which they had been confined by parliament; therefore, in all cases where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar. (*a*)

58. In consequence of these principles, it has been long settled that, where a mortgagee has been in possession for twenty years, without claim, that circumstance may be pleaded to a bill for redemption; unless there be an excuse by reason of imprisonment, infancy, coverture, or absence from the kingdom. For as the statute 21 Jac. I. had made twenty years' possession a
* 460 * * bar to an entry and ejectment, there was the same reason for allowing it to bar a redemption. (*b*) †

59. It has been generally said that *trust estates* are *not* within the Statutes of Limitation; ‡ but this proposition *only applies to cases arising between a cestui que trust and his trustee*, § where there is no adverse possession; for Lord Hardwicke has justly observed that this rule holds [only as between *cestui que trust* and trustee, and not] between the *cestui que trust* and trustee on the one hand, and strangers on the other, as that would be to make the statute of no force at all; because there was hardly any estate of consequence without such trust, and so the act would never take place; therefore, where a *cestui que trust* and his trustee were both out of possession for the time limited, the party in possession had a good bar against both of them. (*c*)

60. It has been already stated that trust estates of freehold are considered, in equity, to be as liable to be devested by abatement or intrusion as legal estates are at law; for otherwise it would be extremely difficult to ascertain in what cases, and

(*a*) Smith *v.* Clay, 3 Bro. C. C. 639, n. Hovenden *v.* Annesley, 2 Sch. & Lefr. 607. 10 Ves. 466. 15 Ves. 496.

(*b*) Tit. 15, c. 3. 1 Anstr. R. 188. 3 Anstr. 755.

(*c*) Lewellin *v.* Mackworth, 15 Vin. Ab. 125. 2 Eq. Ca. Ab. 579, pl. 8.

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† [By stat. 3 & 4 Will. 4, c. 27, s. 28, it is enacted that a mortgagor shall be barred at the end of twenty years, from the time when the mortgagee took possession, or from the last written acknowledgment.]

‡ [*Vide supra*, sect. 56, note.]

§ [This rule only applies to the case of an express trust, and not to that of a constructive trust. 17 Ves. 97. See also Sugd. V. & P. 338. Ed. 6.]

from what periods, the Statutes of Limitation should affect them. (*a*)

61. With respect to *equities of redemption*, it has been settled in the following case that, where a person has made a mortgage in fee, and continues in possession of the estate, paying the interest of the mortgage, he is considered at law as tenant at will to the mortgagee of the legal estate; but in equity he is held to be the entire owner thereof, subject only to the payment of the mortgage. That his possession, being nearly similar to that of a *cestui que trust* of a freehold estate, may be abated or devested by the entry of a stranger, on the death of the mortgagor; and that in such case the negligence of the heir of the mortgagor, in not claiming the estate within twenty years after such entry, will bar him from any remedy in equity. (*b*)

*62. George, Earl of Orford, having made a settlement *461 of the estate in question in 1781, with a power of revocation, made a mortgage of it in fee in 1785, which it was agreed only operated as a revocation *pro tanto*, and continued in possession during the remainder of his life, paying the interest of the mortgage. Upon his death, Mr. Trefusis, who afterwards became Lord Clinton, entered, conceiving himself entitled to the estate under the settlement of 1781; and paid the interest of the mortgage during his life. Upon his death, Lord Clinton, as his eldest son and heir, entered and continued to pay the interest of the mortgage. George, Earl of Orford, was succeeded by his uncle Horace, Earl of Orford, who, by a codicil to his will, devised all his real estates to Mrs. Damer in fee. (*c*)

The Marquis of Cholmondeley, as the heir at law of Horace, Earl of Orford, who was the uncle and heir at law of George, Earl of Orford, and Mrs. Damer, as the devisee of Horace, Earl of Orford, filed their bill in the Court of Chancery against the mortgagee and Lord Clinton, for redemption of the mortgage, to which Lord Clinton pleaded an uninterrupted possession of upwards of twenty years.

The cause was heard before Sir William Grant, M. R., who delivered his opinion in favor of the plaintiff; but made no decree, having sent a case to the Judges of the Court of K. B.,

(*a*) Tit. 12, c. 2. (*b*) *Vide sup.* tit. 15, c. 2, s. 1, note.
(*c*) Cholmondeley *v.* Clinton, 2 Merivale's Rep. 171. (2 Jac. & Walk. 190.)

for their opinion on the construction of the deed of settlement; and resigned before the opinion was returned. The case was therefore reheard before Sir Thomas Plumer, who declared himself to be of a different sentiment from his predecessor. He said that with respect to the *dictum* in Hopkins *v.* Hopkins, which was relied on, he had been favored with a manuscript note of that case in Lord Hardwicke's own handwriting, in
465* *which, instead of the words,—"while the trust continues," that constitute the last sentence of that *dictum* in Atkyns, the words were, "while the trustee continues in possession of the land;" so that it did not apply to this case. (*a*)

That as to the case of Harmood *v.* Oglander, which had also been cited, it had not the least resemblance to the present one; for it related to fee-farm rents, which were not within the Statutes of Limitation; and the opinions there given by Lord Alvanley and Lord Eldon did not apply to this case. As to that of Lawley *v.* Lawley, also cited, he had been furnished with a copy of it from the Register's Book, from which it appeared that the report of it in 9 Mod. was perfectly contrary to the real truth.

That Lord Redesdale, in the case Hovenden *v.* Annesley, had said he thought the Statutes of Limitation must be taken virtually to include courts of equity; for when the legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law, and therefore it must be taken to have virtually enacted, in the same cases, a limitation for courts of equity also. (*b*)

His Honor concluded with saying that he thought time was a bar to this equitable claim by analogy, as it would be if it were a legal estate; and upon that ground he ordered the bill to be dismissed.

Upon an appeal to the House of Peers, Lord Elden said he could not agree to, and had never heard of such a rule, as that adverse possession, however long, would not avail against an equitable estate. He meant where there was no duty which the person who had it had undertaken to discharge for him against whom he pleads adverse possession. The possession of Lord Clinton was adverse; it had been said, that it was taken by con-

(*a*) Tit. 32, c. 20. 2 Jac. & Walker's Rep. 1.
(*b*) Hovenden *v.* Annesley, 2 Schoales & Lefroy, 607.

sent, founded on mistake; but that did not make the possession the less adverse, because Lord Clinton took and kept it for himself; where he owed, as it appeared to him, no duty to Lord Orford. He concluded by stating his opinion to be, that adverse possession of an equity of redemption for twenty years, was a bar to another person claiming the same equity of redemption; and worked the same effect as disseisin, abatement, or intrusion, with respect to legal estates; and that for the quiet and peace of titles, and of the world, it ought to have the same effect. (*a*)

*Lord Redesdale was clearly of opinion, that the plaintiffs were barred by the effect of the Statute of Limitations, and that the bill should therefore be dismissed. He wished it to be understood that his decision rested principally on that ground. He remarked that it had been argued that the Marquis Cholmondeley might, at law, have had a writ of right; that was a writ to which particular privileges were allowed; but courts of equity had never regarded that writ, or writs of *formedon*, or others of the same nature; they had always considered the provision in the statute of James, which applied to rights and titles of entry, and in which the period of limitation was twenty years, as that by which they were bound; and it was that upon which they constantly acted. He considered that the statute was a positive law, which ought to bind courts of equity; and that the Legislature must have supposed that they would regulate their proceedings by it. Sir Thomas Plumer's decree was affirmed. † *466

(*a*) 2 Jac. & Walker's Rep. 190.

[† The only question in this case was, whether a stranger, by an entry on an estate in mortgage, the mortgagee not being in possession, could devest the estate, and thereby acquire a possession adverse to that of the person who was entitled to the equity of redemption.

Now an equity of redemption being nearly similar to a trust estate, and Lord Hardwicke having held, that there might be an equitable seisin of an equity of redemption by the receipt of the rents; it seems to follow that a tortious entry on an equity of redemption, and a receipt of the rents by a stranger, would, in equity, be attended with the same consequences as a disseisin or abatement at law; for the analogy between legal and trust estates should be carried throughout. Lord Hardwicke's doctrine is founded on the great and fundamental principle upon which the Court of Chancery has acted since the time of Lord Nottingham, namely, that equity should follow the law; for, as Lord Cowper has said, 1 P. Wms. 108, if there were not the same rules of property in all Courts, all things would be at sea, and under the greatest

467 * * 63. Where *fraud is charged*, the defendant cannot

uncertainty. 3 Blackst. Com. 441. There are, indeed, two cases in which equity has, in the construction of trust estates, deviated from the rules of law; that of dower, which is universally allowed to be wrong; and that of escheat, which has not met with any approbation.

Sir W. Grant, relying on a *dictum* in Atkyns, states the effect of an entry on a legal estate; and then denies that the same effect, or any thing analogous to it, follows from an entry on a trust estate, or an equity of redemption, and proceeds to say that Mr. Trefusis entering without title, upon the death of George, Earl of Orford, did not gain any equitable interest.

It is admitted, that the entry of Mr. Trefusis did not devest the estate of the mortgagee, because he acknowledged it, by paying him interest; but as to Earl Horace, to whom the equity of redemption, conjoined with the right of possession descended; this entry being inconsistent with his estate, and destructive of the equitable seisin, and interest which descended to him, devested it; and Mr. Trefusis acquired a possession adverse to that of Earl Horace. To devest is merely to turn out of possession, or to prevent the acquisition of a possession; and the entry of a stranger upon a vacant possession, is a devesting of the possession of the person entitled. Therefore, if the maxim that equity follows the law is adhered to, the entry of Mr. Trefusis, upon the death of Earl George, must be considered as an equitable abatement, and a devesting of the estate of Earl Horace; for it cannot be denied but that, in the words of Lord Coke, 1 Inst. 277 *a*, a stranger interposed himself between the death of the ancestor and the entry of the heir.

Where a stranger enters on an estate held as an equity of redemption, without acknowledging the mortgage, he devests the estate of the mortgagee; if he pays him interest on the mortgage, he thereby admits the mortgage, so that his possession being consistent with the estate of the mortgagee, does not devest it: but as the person to whom the equity of redemption really belongs, is entitled to the surplus of the rents, after payment of the interest, the receipt of that surplus by a stranger, to his own use, is clearly adverse to it; for the acknowledgment of one title does not necessarily operate as an acknowledgment of another title not derived from it. The acknowledgment of a mortgage, is an acknowledgment of the title of the mortgagor; but is not an acknowledgment that A, and not B, is entitled to the equity of redemption.

When, therefore, Mr. Trefusis entered on the death of Earl George, and paid the interest of the mortgage, he acknowledged the title of the mortgagee, and also that of Earl George, who made the mortgage. But when he applied the surplus of the rents to his own use, he certainly did not acknowledge the title of Earl Horace to that surplus, but thereby devested the equity of redemption.

There is one material difference between a trust estate and an equity of redemption; namely, that, in the case of a trust estate, the trustee is bound to defend the title to the land; whereas a mortgagee is not under any such obligation. Now, in consequence of this difference, when Mr. Trefusis entered on the death of Earl George, Earl Horace could not, as in the case of a trust estate, compel the mortgagee to make an entry on the land; for while the mortgagee received his interest, he must be presumed to be perfectly indifferent as to who was entitled to redeem, and therefore, could not be expected to interfere; still less to embark in a lawsuit, for the purpose of ascertaining a matter in which he was not concerned. Earl Horace was, therefore, bound to vindicate his right to the equity of redemption, which then accrued to him, by making an entry; and if that was resisted, by filing his bill in Chancery; and his acquiescence for twenty years ought to have the same effect, in equity, as a non-claim for that period, at law.

plead the Statute of Limitations to the discovery of his title, but must answer to the fraud.† [1]

64. * A bill was brought for a discovery of the defend- *468
ant's title, charging fraud in the defendant, and praying to be let into possession of the estate. The defendant pleaded the Statute of Limitations, both to the discovery and relief. (*a*)

Lord Hardwicke was of opinion that the defendant could not plead the Statute of Limitations to the discovery; but must answer the fraud. That as the defendant had pleaded it, it was in the nature of a demurrer; for the defendant not averring any fact to which the plaintiff might reply, but resting it on facts of the plaintiff's own showing; if he was to allow the plea, the plaintiff could not take exceptions to the answer, and therefore overruled the plea.

65. In another case Lord Hardwicke is reported to have said —" There may be a case where the circumstance of concealing a deed shall prevent the statute's barring: but there it must be a voluntary and fraudulent detaining; for to say that merely having an old deed in one's possession, shall deprive a man of the

(*a*) Bicknell *v.* Gough, 3 Atk. 558.

The reasons upon which Sir W. Grant founded his opinion in this case, have a most dangerous tendency; for if it should be established that there can be no abatement, and consequently no adverse possession of a trust estate, or of an equity of redemption, then the doctrine of limitation, as adopted by the courts of equity, will be inapplicable in every case where an outstanding legal estate, which happens perpetually, or an outstanding mortgage, which is also extremely common, can be shown to exist; for it follows from his reasoning, that if Mr. Trefusis and his descendants had been in the quiet and uninterrupted possession of the estate for a century, the decree must have been the same.—*Note by Mr. Cruise.*

† [By stat. 3 & 4 Will. 4, c. 27, sect. 26, it is enacted, that in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent, of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before the time at which such fraud shall, or with reasonable diligence might have been first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase, did not know, and had no reason to believe that any such fraud had been committed.]

[1] [The statute, in cases of fraud, does not begin to run until the fraud is discovered. It does not necessarily begin to run from the time when the facts constituting the fraud became known. Ferris *v.* Henderson, 12 Penn. State R. (2 Jones,) 49; Stocks *v.* Van Leonard, 8 Geo. 511.]

benefit of the act, is going too far; and would be a hard construction of a statute for quieting possessions: it must therefore be an intentional concealment." (*a*)

66. It is said, that if a person sues in Chancery, and pending the suit there, the Statute of Limitations attaches on his demand, and his bill is afterwards dismissed; the matter being properly determinable at law, the Court will preserve the plaintiff's right, and will direct that the defendant shall not plead the Statute of Limitations in bar to the demand. But in another case it was said that the Court of Chancery would allow the Statute of Limitations to be pleaded, unless the party in such suit was stayed by act of the Court, as by an injunction. (*b*)

67. A legacy given out of real property is only recoverable in a court of equity, and therefore is not within the Statutes of Limitation. It follows that length of time alone will bar it:
469 * *but it will raise a presumption of payment, which, unless repelled by evidence of particular circumstances, will be conclusive. (*c*)

68. In a modern case, where a bill was brought for the payment of a legacy, which was resisted on the ground of presumed payment, arising from the length of time that had elapsed without any demand, which was above forty years; and because the representatives, both real and personal, and all the persons who could throw any light on the subject were dead. Lord Commissioner Eyre said:—" It is a presumption of fact in legal proceedings before juries, that claims, the most solemnly established on the face of them, will be presumed to be satisfied, after a certain length of time. Courts of equity would do very ill by not adopting that rule. So essential is it to general justice, that though the presumption has often happened to be against the truth of the fact, yet it is better for the ends of general justice, that the presumption should be made and favored, and not be easily rebutted, than to let in evidence of demands of this nature, from which infinite mischief and injustice might arise. (*d*)

(*a*) 15 Vin. Ab. 125, pl. 8. Alden *v.* Gregory, 2 Eden, 280.

(*b*) Gilbert *v.* Emerton, 2 Vern. 508. Mackenzie *v.* Powis, 7 Bro. Parl. Ca. 282. Anon. 2 Cha. Ca. 217. Tit. 35, c. 14.

(*c*) 1 Vern. 256. Fotherby *v.* Hartridge, 2 Vern. 21.

(*d*) Jones *v.* Turberville, 2 Ves. 11.

The Court presumed that the legacy was paid, and dismissed the bill. (*a*) †

(*a*) *Vide sup.* note to sect. 51, page 457.

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† [See Montresor *v.* Williams, MSS. cited 1 Roper's Legacies, 792. Ed. 1828. Heard before Sir John Leach, V. C. 1823. Campbell *v.* Graham, 1 Rus. & Myl. 453, and stat. 3 & 4 Will. 4, c. 27, s. 40; *supra*, sect. 51, note.]

END OF VOL. III. OF CRUISE'S DIGEST.

A

DIGEST

OF

THE LAW OF REAL PROPERTY.

BY WILLIAM CRUISE, ESQ.

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REVISED AND CONSIDERABLY ENLARGED

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FURTHER REVISED AND ABRIDGED, WITH ADDITIONS AND NOTES, FOR THE USE OF AMERICAN STUDENTS,

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IN SEVEN VOLUMES.

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A

DIGEST

OF THE

LAW OF REAL PROPERTY.

TITLE XXXII.

DEED.

BOOKS OF REFERENCE UNDER THIS TITLE.

BLACKSTONE'S COMMENTARIES. Book II. ch. 20.
KENT'S COMMENTARIES. Vol. IV. Lect. 67.
WILLIAM SHEPPARD. Touchstone of Common Assurances. The best edition is that of Mr. Preston.
The same. The Law of Common Assurances.
The same. The Precedent of Precedents.
JOHN PERKINS. A Treatise of the Laws of England, on the various branches of Conveyancing.
RICHARD PRESTON. An Essay, in a Course of Lectures, on Abstracts of Title.
The same. A Treatise on Conveyancing.
CHARLES WATKINS. Principles of Conveyancing. (Preston's ed.)
The same. With the Notes of Morley, Coote, and Coventry, and the Additions of Mr. White.
THOMAS COVENTRY. On Conveyancers' Evidence.
CHARLES BARTON. Elements of Conveyancing, in Theory and Practice.
JAMES STEWART. The Practice of Conveyancing, comprising every usual Deed analytically and synthetically arranged.

JAMES B. THORNTON. A Digest of the Conveyancing, Testamentary, and Registry Laws of all the States of the Union, &c.

WALTER H. BURTON. An Elementary Compendium of the Law of Real Property.

LAW MAGAZINE. The Articles "On Conveyancing," in Vols. I. II. III.

OWEN FLINTOFF. Law of Real Property. Vol. II. Book I. ch. 14, 19, 22.

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OF REGISTERING AND ENROLLING DEEDS.

CHAP. I.

NATURE OF DEEDS.

SECT. 1. *Alienation of Lands.*
15. *Different kinds of Assurances.*
16. *Of a Deed.*
19. *Deed Poll.*
SECT. 20. *Indenture.*
25. *A Deed transfers the Estate without the Assent of the Grantee.*
27. *Articles of Agreement.*

SECTION 1. The third mode of acquiring an estate by purchase, is *alienation;* under which is comprised *every method whereby estates are voluntarily resigned by one person, and accepted by another.* Lord Coke says, the word alienation is derived from *alienare,* id est, *alienum facere; vel ex nostro dominio in alienum transferre, sive rem aliquam in dominium alterius transferre.* (*a*)

(*a*) 1 Inst. 118, b.

2. It is admitted by all our legal writers, that an unlimited power of alienation existed in England, in the time of the Saxons. That upon the settlement of the Normans, and the establishment of the feudal law, all lands became unalienable; and that during the reigns of William I. and his sons, the doctrine of non-alienation was, for various reasons, strictly enforced. (*a*)

*3. The greater part of the lands throughout the kingdom had been distributed among the Norman barons, as *4
strict and proper feuds, upon condition of military service; and as a considerable jealousy prevailed against all those who were of Saxon origin, lest they should attempt to reinstate themselves in their ancient possessions, great care was taken, during that period, that all the vassals of the Crown, who could alone be depended on, in case of any insurrection, should be in a situation to perform their military services. (*b*)

4. The first step towards a liberty of alienation was that by which the tenant was permitted to aliene, with the consent of his lord. This law was adopted from the maxims which then prevailed on the Continent; and gave rise to fines for alienation. But in England the tenant could not dispose of his land, even with the consent of his lord, unless he had also obtained that of his next heir. It was therefore common, in ancient feoffments, to express that the alienation was made with the consent of the feoffor's heir. (*c*)

5. The power of alienation was further extended by a law of Hen. I. c. 70, which allowed every person to dispose of such lands as had been purchased by himself. *Emptiones vero, vel deinceps acquisitiones suas det cui magis velit. Si bockland habeat, quam ei parentes sui dederunt, non mittat eam extra cognationem suam.*

6. Glanville has given us a very circumstantial account of the law, as it stood in the reign of Hen. II. respecting alienation; from which it appears that the power of selling land was then considerably enlarged; and the right of alienation seems to have been soon after extended to all lands which a person had himself acquired, provided they had been conveyed to him and his

(*a*) Wright's Ten. 154. (*b*) Dissert. c. 2, s. 1.
(*c*) Glanv. lib. 7, c. 1. Mad. Form. No. 316. Wright, 167.

assigns; and also to a fourth part of all lands acquired by descent, without the consent of the heir. (*a*)

7. There was also a particular mode of alienation which appears to have been always allowed, and called in the feudal law *Subinfeudation;* that is, where the proprietor of a feud granted a portion of it to be held of himself, by which manors were created. And it appears from the Black Book of the Exchequer, published by Hearne, that in the reign of Hen. II., the King's tenants had created a vast number of knight's fees to be held of themselves. (*b*)

5* *8. The practice of subinfeudation produced a grievance, much complained of in those days; the persons who held of the King's tenants began to grant still smaller estates, to be held of themselves, and were so proceeding downwards, *in infinitum*, till the superior lords observed that, by this, they lost all their feudal profits, which fell into the hands of these mesne or middle lords. Besides, these mesne lords were thereby less able to perform their military services.

9. This caused an article to be inserted in *Magna Charta*, prohibiting alienation, unless sufficient was left to answer the services due to the superior lord. *Nullus liber homo det de cetero amplius alicui, vel vendat alicui de terra sua, quam ut de residuo terræ suæ possit sufficienter fieri domino feudi, servitium ei debitum, quod pertinet ad feudum illud.* But as the inconveniences which attended the practice of subinfeudation continued, an ineffectual remedy was at length adopted by the statute *Quia emptores terrarum*, 18 Edw. I. which, reciting the losses sustained by the great lords, enacted:—*Quod de cetero liceat unicuique libero homini terras suas, seu tenementa sua, seu partem inde, ad voluntatem suam vendere: ita tamen quod feoffatus teneat terram illam, seu tenementum illud, de capitali domino feodi illius, per eadem servitia et consuetudines per quæ feoffator suus illa prius de eo tenuit.* (*c*)

10. Sir Martin Wright observes, that this statute took from the tenants of common lords the feudal liberty they claimed, of disposing of part of their lands, to hold of themselves; and, instead of it, gave them a general liberty to sell all, or any part,

(*a*) Glanv. lib. 7, c. 1. (*b*) Dissert. c. 2, s. 3.
(*c*) 1 Inst. 43 a. 2 Inst. 53. 1 Inst. 98 b. 2 Inst. 66, 500. Dissert. c. 2, s. 13.

to hold of the next superior lord, which they could not have done before without consent. But neither *Magna Charta*, nor the statute *Quia emptores*, extended to the King's immediate tenants; who seem to have been so strictly restrained from alienation that they were not permitted to dispose of their lands, even to their eldest sons. Thus it appears from the rolls of parliament, that in 18 Edw. I. Gilbert de Humfraville petitioned the King for license to enfeoff his eldest son and his wife, of the manor of Overton, to hold of the said Gilbert during his life, and after his death, of the chief lord, by the usual services; to which the King answered:—*Rex non vult aliquem medium, et ideo non concessit.* (*a*)

11. This restraint upon the King's immediate tenants is *supposed to have been indirectly removed by the stat. *6 *De Prerogativa Regis*, 17 Edw. II. c. 6, by which it was declared that no person who held of the King *in capite*, by military service, should alienе the greater part of the land, so that the remainder were not sufficient to answer his services, without the King's license; in consequence of which the King's consent was necessary to every alienation made by his tenants *in capite*. And it became a question, whether, if such tenant aliened without license, the land was not forfeited; or whether the King should only seize it, by way of distress, till a fine should be paid for the contempt. This was settled by the stat. 1 Edw. III. c. 12, by which it was enacted that in all cases of alienation, by tenants *in capite*, the King should not hold the lands as forfeited, but should have a reasonable fine in Chancery. (*b*)

12. It remained much longer a doubt whether the King's tenants might have aliened any part of their lands, to hold of themselves; as the tenants of inferior lords might before the statute *Quia emptores*. But such alienations made by tenants who held of King Hen. II., or other kings before him, were at length made good by the stat. 34 Edw. III. c. 15, saving to the King his prerogative of the time of his grandfather, and of his own time. (*c*)

13. Sir M. Wright observes, that it is extremely doubtful what prerogative was here saved to the Crown; but it was perfectly clear that fines for alienation were established by the stat.

(*a*) Wright, Ten. 161. Rot. Parl. Vol. I. 54. Fitz. N. B. 175.
(*b*) Wright, Ten. 162, 165. (*c*) Wright, Ten. 166.

1 Edw. III., and after this act Lord Coke says, writs of *quo titulo ingressus est*, issued from the Exchequer, to help the King to his reasonable fine, whereupon the feoffee was driven to plead, to his great charge and trouble. It was, therefore, upon conference with the King's officers, and the judges, ordained,—seeing the King's tenants could not aliene without license, for if they did, they should pay a fine,—that for a license to be obtained, the King should have a third part of the annual value of the land, which was holden reasonable; if the alienation was without license, then a reasonable fine, by the statute, was to be paid by the alienee, which they resolved to be one year's value. (*a*)

14. Thus continued the law till the abolition of military tenures by the stat. 12 Cha. II. c. 24, which takes away all fines for alienations, seizures and pardons for alienations, and all charges incident thereunto; saving fines for alienation,
7* due by * the customs of particular manors and places; so that all freehold estates became thereby alienable without license or fine.

15. With respect to the different modes of alienation, or rather the legal evidences of the transmission of real property, they are called the *common assurances* of the realm, whereby every man's estate is assured to him, and all controversies, doubts, and difficulties respecting them are either prevented or removed. Of these there are four kinds: I. *Deeds* or matters *en pais*, which are assurances transacted between two or more private persons, in the country; that is, according to the old law, upon the very spot or piece of land to be transferred. II. *Matters of record*, or assurances transacted only in the King's public Courts of Record. III. Assurances deriving their effect from *special custom*, obtaining in some particular places; and relating only to some particular species of property. IV. A *devise* contained in a person's last will and testament, which does not take effect till after his death.[1]

(*a*) Wright, Ten. 166.

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[1] There is another mode of conveyance, sanctioned by long usage in the States of *Maine*, *New Hampshire*, and *Massachusetts*, where the grantee, whose title-deed has not been registered, delivers it back to the grantor to be cancelled, and abandons the possession. This is held to revest the estate in the grantor; not, however, by way of transfer, nor strictly speaking, by way of release, working upon the estate; but rather as an estoppel, arising from the voluntary surrender of the legal evidence, by which

16. A *deed* is a *writing on parchment or paper,*[1] *sealed and delivered,* to prove and *testify the agreement of the parties* whose deed it is, *to the things therein contained.* It is sometimes called a charter (*charta*) from its materials; but most usually when applied to the transactions of private persons, it is called a deed; in Latin, *factum,* because it is the most solemn and authentic act that a man can perform, in the disposal of his property. (*a*)

17. It is probable that every alienation of land was very soon accompanied with some written evidence; though, in the time of the Saxons, a legal transfer might be made of lands by certain ceremonies, without any charter or writing. Thus, Ingulphus, in his History of the Abbey of Croyland, says—*Conferebantur multa prædia nudo verbo, absque scripto vel chartâ; tantum cum domini gladio, galeâ, vel cornu, vel craterâ; et plurima tenementa cum calcari, cum strigili, cum arcu; et nonnulla cum sagittâ.* Deeds or charters were notwithstanding in use at that time. These were generally called *gewrite* or writings; the particular deed, by which a free estate might be conveyed, was

(*a*) Shep. Touch. 50. (2 Bl. Comm. 297. 4 Kent. Comm. 452.)

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alone the title originally passed. But this method of conveyance is limited to transactions conducted in perfect fairness and good faith, both as between the parties, and as to the creditors of the grantee, and is not permitted to affect the intervening rights of third persons. It therefore would not operate to defeat the attaching creditors of the grantee, nor to debar his widow of her dower in the land. See Trull *v.* Skinner, 17 Pick. 218, 215; Farrar *v.* Farrar, 4 N. Hamp. 191; Commonwealth *v.* Dudley, 10 Mass. 403; Barrett *v.* Thorndike, 1 Greenl. 73; Nason *v.* Grant, 8 Shepl. 160; Tomson *v.* Ward, 1 N. Hamp. 1; [Mussey *v.* Holt, 4 Foster, (N. H.) 248;] Holbrook *v.* Tirrell, 9 Pick. 105. But it is admitted in these cases, and abundantly settled by others, that the mere cancellation of the deed, by the grantee, without more, does not devest his title or revest it in the grantor.

It may be added, that, though this mode of conveyance may seem to stand on the ground of local usage, yet it is professedly maintained by the learned Judges, on the principles of the common law only. See 4 N. Hamp. 195; 17 Pick. 215.

[1] The materials of paper and parchment, or vellum, are selected, as best securing the durability of the instrument, and its integrity, or freedom from the danger of alteration. If, therefore, it is written on any other material, it is not technically a deed, and cannot be pleaded as such; though courts of equity will give it effect as an agreement to convey, by decreeing a specific performance; and it may also, if it contain sufficiently apt words, be good evidence of a special contract in writing, in courts of common law. See 1 Story on Eq. Jur. § 136, 172, 173. Cannel *v.* Buckle, 2 P. Wms. 143.

called *landboc*, *libellus de terra*, a donation or grant of land; and the land thus granted was called *bockland.* (*a*)

8* *18. Upon the introduction of the Norman customs, the solemn and public delivery of the possession, in imitation of the feudal investiture, became essentially necessary to the transfer of land; and was alone sufficient for that purpose. But as written charters constituted a much better species of evidence of the agreement, a charter or deed, in imitation of the *breve testatum* of the feudal law, was usually prepared and executed, and delivered to the purchaser, at the same time with the land. But the increase of commerce and wealth having introduced a greater degree of refinement of manners, agreements and conveyances became more complex, which produced an universal practice of reducing them into writing; still, lands might have been transferred by a verbal contract only, provided it was attended with a solemn and public delivery of the possession, till the latter end of the reign of King Charles II. (*b*)

19. *Deeds* are divided into *two sorts; deeds poll,*[1] or cut in a straight line, and *deeds indented.*[1] A *deed poll* is not, strictly speaking, an agreement between two persons,[2] but *a declaration of some one particular person,*[2] respecting an agreement made by him with some other person.[2] Thus a feoffment from A to B, by deed poll, is not an agreement between A and B, but rather a declaration by A, addressed to all mankind, informing them that he thereby gives to B certain lands therein described. It was formerly called *charta de unâ parte*, and usually began thus:—*Sciat præsentes et futuri quod ego, A. dedi, &c.*, and now begins in these words:—Know all men by these presents, that I, A, have given, granted and enfeoffed, and by these presents do give, grant, and enfeoff, &c. (*c*)

(*a*) Madox Formul, 283. (*b*) Dissert. c. 1, s. 45. (*c*) Lit. s. 370, 372.

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[1] Deeds are at this day understood to derive their *names* only, and not their essential differences, from the manner in which the parchment is cut. A *deed poll* is one which contains the language, signature, and seal of the grantor only. An *indenture*, also called a deed *inter partes*, is one which contains the language, signatures, and seals of several parties.

[2] The word "*party*" would more accurately express the legal idea intended to be conveyed in these places; since several "*persons*" may constitute but one "*party*," in an indenture, and never can do more in a deed poll.

20. An *indenture* is a *mutual agreement* between two or more persons,[1] whereof each party has usually a part. Formerly, when deeds were more concise than they are at present, it was usual to write both parts on the same skin of parchment, with some words, or letters of the alphabet written between them, through which the parchment was cut in acute angles, *instar dentium*, from which they acquired the name of indentures, or deeds indented; in such a manner as to leave half the word on one part, and half on the other. (*a*)

21. Lord Coke says, to constitute an indenture, it is absolutely necessary that the paper or parchment on which the deed is written be cut *instar dentium*, on the top or side. And in * Stile's case, where a deed was produced as an indenture, which was not indented, beginning with the words *hæc indentura*, it was adjudged that it was not an indenture, although it was in two parts; for the words of a deed cannot make it indented; but to the making of an indenture, there ought to be a manual act of indenting the parchment or paper. (*b*)[2] *9

22. The practice has long been to cut the first skin of parchment on which an indenture was written, in an undulating line. It is said, that if only the form of indenting the parchment or paper be wanting, this is not material; for it might even be done in court, and therefore no exception is now taken on such a trifling omission. (*c*)

23. In the case of an *indenture*, there ought *regularly to be as many copies of it as there are parties;* and when the several parts are interchangeably executed by the several parties, that

(*a*) Lit. s. 370.
(*b*) 1 Inst. 143 b, 229 a. (Shep. Touchst. 50. Frampton *v.* Stiles,) 5 Rep. 20.
(*c*) 4 Bac. Ab. 51.

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[1] The word "*party*" would more accurately express the legal idea intended to be conveyed in these places; since several "*persons*" may constitute but one "*party*," in an indenture, and never can do more in a deed poll.

[2] The doctrine of the case between Frampton and Stiles, and the opinion of Lord Coke to the same effect, are now alike exploded; no notice having been taken, for many years, of the omission of the manual act of indenting; and still earlier, when excepted to, the indenting was allowed to be done in Court. See 2 Bl. Comm. 296, and note (2) by Chitty; 1 Steph. Comm. 447. 4 Bac. Abr. 51, note (*), Gwillim's ed.; Currie *v.* Donald, 2 Wash. 58, 63.

part or copy which is executed by the grantor, is usually called the *original*, and the rest are *counterparts*. Though of late it is most frequent for *all* the parties to *execute every part*, which renders them *all originals*. But a counterpart of a deed has been admitted to be sufficient evidence of such deed; and a conveyance decreed accordingly. (*a*)

24. If there happens to be any variance between the indenture and counterpart, it shall be taken as the deed of the grantor is, and the other shall be intended only the misprison of the writer. (*b*)

25. *All deeds*, whether deriving their effect from the common law, or the statute of uses, *except a feoffment*, do, *immediately* upon their execution by the grantors, *devest the estate* out of them, and put it in the party to whom the conveyance is made, though in his absence, and without his knowledge, till some disagreement to such estate appears. (*c*) [1]

(*a*) Eyton *v.* Eyton, Prec. in Cha. 116. (*b*) Finch's Law, 109.
(*c*) Gorton's Case, *infra*, c. 12, § 48.

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[1] Every conveyance requires two parties, namely, a grantor or giver, and a grantee or receiver; and two acts, namely, the grant or gift, and the acceptance of it. The property may be offered to another, to become his if he will have it; but until he accepts the offer, the title remains in the former owner, unchanged. Where it is the duty of the other party to accept, his acceptance may be conclusively presumed against him, in favor of the offerer, so far as to pass the title; as in the case of a tender of specific articles by a debtor to his creditor, in fulfilment of the obligation. But where there is no duty, it seems difficult to maintain that the estate passes out of the grantor immediately upon the formal execution of the deed; in the absence and without the knowledge of the grantee; though, if delivery be made at the time to another person, as the agent and for the use of the grantee, his subsequent ratification may relate back to the time of delivery. Yet until that time, it is only an inchoate transfer, vesting the estate in him provisionally, and *sub modo;* but liable to be defeated by the intervening rights of creditors of the grantor. Thus, where one Holden, being in embarrassed circumstances, made a deed of conveyance to Harrison and Wilby, his sureties, by way of precautionary indemnity, of which they had no knowledge until the lapse of a month afterward, when it was assented to by them; after which the land was taken in execution by Holden's creditors; in an action by writ of entry, brought by the heirs of Harrison against these creditors, Parker, C. J., in delivering the judgment of the Court, said: "It is very certain that, until the deed was accepted by Harrison, the title to the estate had not passed out of Holden; and that his creditors might have arrested the transaction by causing the estate to be attached. For no man can make another his grantee, without his consent: and a deed, made to a man with all requisite formalities, and even entered in the public registry, would be null, if not afterwards accepted by the grantee. But if the grantee afterwards assent to the conveyance, it will be good to pass the title to him, unless some other circumstances shall be shown to render it

26. This doctrine is *founded on the principle*, that the *assent of the party* who takes, is *implied* in all conveyances;[1] 1. Because

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invalid." Harrison *v.* The Trustees of Phillips Academy, 12 Mass. 461. [See, also, Baxter *v.* Baxter, Busbee, Law, (N. C.) 341.]

It may be added, that Gorton's case, cited by the author in support of the text, does not seem to warrant so general and unqualified a statement; it being merely a conveyance to A to the use of B; where it was holden that the subsequent dissent of A should not operate to defeat the use limited to B. All that Rolle says of it, is stated *infra*, ch. 12, § 48; but there is a somewhat different report of the case, by the name of Darrell *v.* Gunter, in W. Jones, 206. See further, *infra*, ch. 2, § 61–67.

[1] This, it is conceived, is too broadly stated. It is certainly true that the law does not cast an estate on any person, or make him the owner of it, against his will, nor without his assent. But it is too much to say that the law implies the assent of the grantee or alienee in *all* conveyances; for the acceptance of a title may sometimes be highly injurious to the party; as, for example, if, having already a title by long possession, a lease were made to him from the disseisee. Such assent and acceptance is presumed only where the conveyance is beneficial to the grantee; and whether beneficial or not, is a question to be determined by all the facts in the case, and not merely by what appears on the face of the instrument. Where the conveyance is absolute and unconditional, in the absence of contrary evidence, the assent of the grantee will be presumed; for such a title is supposed to be for the benefit of every man. So, if it be not absolute, but still appears on its face to be beneficial to the grantee, his acceptance will be presumed. In other cases, the fact that the acceptance of the conveyance was for the interest of the grantee, must be established by proof, before its actual acceptance can be inferred. See Camp *v.* Camp, 5 Conn. 291, 300; Halsey *v.* Whitney, 4 Mason, 206, 214; Jackson *v.* Bodle, 20 Johns. 184.

But if a deed is made to one ignorant of the fact, and is deposited with a third person for his use, though his subsequent assent may relate back, and render the conveyance absolute, *ab initio*, as between the parties, yet it will not operate to displace and defeat intervening rights, such, for example, as the right of an attaching creditor. Harrison *v.* The Trustees of Phillips Academy, 12 Mass. 461, per Parker, C. J. It is a maxim, that *relation is a fiction of law;* 8 Rep. 28 b; and that *relations shall not do wrong to strangers.* 3 Rep. 36 a; 1 Ld. Raym. 516, 517; 2 Ventr. 200. *In fictione juris semper æquitas existit.* Broom's Legal Maxims, p. 54.

But it is said that, in common-law conveyances, a deed, delivered to a third person for the use of the grantee, vests the estate in him before he has any notice that any conveyance was made or intended. And for this, the cases of Thompson *v.* Leach, 2 Ventr. 198, and Read *v.* Robinson, 6 Watts & Serg. 329, are cited.

In the former of these cases, a tenant in fee devised the premises to his brother, Simon Leach, for life, remainder to his eldest son in tail male, remainder to *Sir* Simon Leach in tail male, remainder to the testator's own right heirs in fee. The brother, *before* the birth of any issue, *surrendered* his life-estate, by deed, to *Sir* Simon Leach, the defendant; but continued in possession of the premises; and afterwards had a son, Charles Leach, the lessor of the plaintiff. The defendant did not accept and agree to the surrender until nearly five years after the birth of Charles, the son. And the question was, whether the surrender took effect to pass the estate of the grantor to the grantee from the execution of the deed, or not until its acceptance by the grantee. If the former, then the contingent remainder to Charles would be defeated, by the destruction of the particular estate before the happening of the contingency, namely, the birth

there is a strong intendment in law, that it is for a person's benefit to take; and no man can be supposed unwilling to do that

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of the remainder-man; but if the latter, the remainder would have already become vested, and so beyond the reach of the tenant for life. The opinion of three Judges of the Common Pleas, against that of Ventris alone, was, that "there was no surrender, till such time as *Sir* Simon Leach had notice of the deed of surrender, and agreed to it; and so the remainder was vested in Charles, the son; and it was not defeated by the agreement of *Sir* Simon, after his birth, to the surrender." The reasons of the judgment are not given, but Ventris reports his own dissenting opinion at large. A writ of error being brought in the King's Bench, to reverse this judgment, it was there affirmed, by all the Judges. 2 Ventr. 208. The case in B. R. on error, is reported, in 3 Mod. 296. But afterwards, on error brought in the House of Lords, the judgment was reversed, "upon the reasons given in the aforesaid argument" of Ventris. A second ejectment was then brought, 3 Mod. 301, in which it was found that the brother, at the time of the surrender, was a person *non compos mentis;* and it was held, both in B. R. and in the House of Lords, on error, that for this cause the surrender was merely void, and not voidable only. But Shower says, it was affirmed "without much debate;" Show. Parl. Cas. 150, 154; and Lord Mansfield observed that, though much was said, in the original argument, to prove the doctrine that the surrender of an infant or a lunatic was void, "more was said to overturn that doctrine." Zouch *v.* Parsons, 3 Burr. 1807. In the prior ejectment, it is worthy of notice that seven of the twelve Judges of England were clearly of opinion that there was no surrender, until it was accepted; and that, in the House of Lords, the only Judges who were of the contrary opinion, were Ventris and Sir Robert Atkins, Chief Baron of the Exchequer. See 3 Lev. 285. If, therefore, the question were general, whether the title to an estate passed to the grantee upon the execution of the deed, and without his knowledge, it is not improbable that among American jurists, at this day, the opinion of the majority of the Judges would be held as the better opinion. But that particular case was not the case of a grant of an estate from the absolute owner to a stranger, who had no previous interest in it; but it was the case of the annihilation of a particular estate, in favor of a person to whom, on the termination of that estate at that time, by what mode soever, the whole property would belong *by its original limitation.* Such seems to be the main stress of the argument of Ventris, who concedes that "a man cannot have an estate put into him in spite of his teeth;" and such, therefore, was probably the ground of the ultimate decision, the surrender being regarded simply as a renunciation or annihilation of the particular estate by the act of the tenant alone, leaving the original devise to take effect as if the estate for life had never been accepted. In the latter case, of Read *v.* Robinson, one A. made a general assignment to T. for the benefit of his creditors, and sent it, by his son, to his friend W. in Philadelphia, to be delivered to T.; but T., on learning the fact, refused to receive the assignment, or to have any thing to do with it. In a few days, A. died; after which, on the petition of one of his creditors, pursuant to a statute of Pennsylvania, Chancery dismissed T. from the trust, and appointed Read as trustee under the assignment, in his stead. Whereupon Read brought trover against A.'s executor, for the goods assigned. And it was held that the title passed to T. in trust, upon delivery of the deed to A.'s son, for a declared purpose; and that on his refusal it revested in A. But that, as the trust once took effect, the case was clearly governed by the statute, which directed the Courts to appoint trustees in all cases "when any sole assignee or trustee shall renounce the trust, (or refuse to accept it,) or refuse to act under, or fully to execute the same;" (Dunlop's Dig. 686;) and on *this*

which is for his advantage. 2. Because it would seem incongruous and absurd that, when a conveyance is completely executed on the grantor's part, the estate should continue in him. 3. Because, if the operation of a conveyance was allowed to be in suspense, and to expect the agreement of the party to whom it was made, there would be an uncertainty of the freehold. (*a*)

*27. It is a common practice for persons to enter into an article of agreement, preparatory to the execution of a formal deed, whereby it is stipulated that one of the parties shall convey to the other certain lands, or release his right to them, or execute some other disposition of them. *10

28. An *article* is therefore considered as a *memorandum or minute of an agreement*, to make some future disposition or modification of real property. Such an instrument will *create a trust* or equitable estate, and a specific performance of it will be decreed in Chancery.

29. Articles are usually entered into for the purchase and sale of lands; for the taking and granting of leases; for making mortgages, and settlements on marriage.

(*a*) Thompson *v.* Leach, 2 Vent. 201. 3 Mod. 296.

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ground the plaintiff was entitled to recover. The first point was decided upon the authority of Thompson *v.* Leach, a portion of Ventris's argument being quoted; but it is respectfully suggested that this was not necessary to be decided, inasmuch as here was a trust expressly *declared* by the act of the debtor, and a refusal to accept, and so the case was within the very letter of the statute, which imperatively disposed of it.

That the assent of the grantee will be presumed in cases where the conveyance is for his benefit, and *where the rights of third persons are not injuriously affected*, see the preceding note. For the upholding of such conveyances, and to effect the intent, this presumption may doubtless be conclusively made, even though the grantee be a feme covert, or an infant, or other person lacking discretion.

But that in all other cases, it is a general rule that the assent of the grantee is necessary to pass the estate; see further, Maynard *v.* Maynard, 10 Mass. 456; Jackson *v.* Dunlap, 1 Johns. Cas. 114; Jackson *v.* Phipps, 12 Johns. 418.

CHAP. II.

CIRCUMSTANCES NECESSARY TO A DEED.

SECT. 2. I. *Sufficient Parties.*
6. *Who may convey by Deed.*
8. *The King.*
9. *Corporations.*
11. *Who are incapable of conveying.*
12. *Infants.*
15. *Marriage Contracts by Infants.*
22. *Infant Trustees may convey.* [Note.]
23. *Idiots and Lunatics.*
23. [*Where Trustees out of the Jurisdiction of the Court of Chancery, or not known,* note.].
SECT. 24. *Married Women.*
30. *Persons attainted.*
31. *Who may be Grantees.*
34. *Conveyances to charitable Uses.*
36. II. *Consideration.*
42. *Different Kinds of.*
45. III. *Writing.*
49. *Proper Stamps.*
50. IV. *Sufficient Words.*
53. V. *Reading, if required.*
54. VI. *Sealing and Signing.*
61. VII. *Delivery.*
68. *Delivery as an Escrow.*
77. VIII. *Attestation by Witnesses.*

SECTION 1. When it became usual to reduce all agreements into writing, the following circumstances were deemed necessary to a deed:—I. Sufficient *parties*, and a proper *subject-matter*. II. A good and sufficient *consideration*. III. *Writing*, on paper or parchment, duly *stamped*. IV. *Words sufficient* to specify the agreement and bind the parties, legally and orderly set forth. V. *Reading*, if desired. VI. *Sealing* and *signing*. VII. *Delivery*. VIII. *Attestation* by witnesses.

2. I. The *first circumstance* requisite to a valid deed is, that there be *persons* able to contract and be contracted with, for the purposes intended by the deed, and also a thing or *subject-matter* to be contracted for; so that, in every deed, there must necessarily be a *grantor*, a *grantee*, and a *thing granted*.

3. *All those who have any estate, right, title, or interest* whatever, either at law or in equity, in that which is the
12* subject-matter * of a deed, *must necessarily be parties to it*, otherwise their estates or interests will remain in them. All those *who are intended to take an immediate estate* under a deed

indented, must also be parties to it; but a person may take an estate *in remainder*, by a deed to which he is *not a party*: (*a*) and when the person to whom the remainder is limited, enters on the land, he then becomes bound to perform the conditions contained in the deed. (*b*)

4. In a *deed poll*, the person with whom the agreement is made becomes, *in fact* a *party* to it. Thus, if A, by deed poll, agrees to pay a sum of money to B, an action may be maintained by B upon it, though he be a stranger, and did not seal it. (*c*) [1]

5. A power of attorney may be given, in a deed poll, to a stranger, to make livery of seisin; though it was formerly held that such a power could, in an indenture, be only given to one of the parties to it. (*d*)

6. With respect to the *persons who are capable of conveying* by deed, it may be laid down, as a general rule, that *all* those who, having attained the age of *twenty-one years*, are of *sound mind* and understanding, and *not under the power of others*, may be parties to, and bind themselves by, deed.

7. Persons who are *blind*, *deaf*, or *dumb*, or both deaf and dumb, may convey by deed; if it appear that, notwithstanding those disabilities, they are capable of comprehending the nature and consequences of a deed, and can express their meaning by writing or signs. (*e*)

8. By the common law the king can only grant and take by matter of record; but, by statute 39 & 40 Geo. III. c. 88, the king and his successors are enabled to convey all lands purchased with their privy purse, and also all such estates as shall come to them by escheat, in the same manner as a subject. (*f*) [2]

9. *A *corporation sole*, as a bishop or parson, may be *13. a party to a deed; and although a *corporation aggregate* is said to be invisible, immortal, and to exist only in supposition of law, yet such an artificial body is capable, by its creation, of

(*a*) (Hornbeck *v.* Westbrook, 9 Johns. 73.)
(*b*) 1 Inst. 230 b, 231 a. 2 Inst. 678.
(*c*) Com. Dig. Fait, D. 1.
(*d*) 1 Inst. 52 b.
(*e*) Perk. s. 25. (Brown *v.* Brown, 3 Conn. R. 299.)
(*f*) Tit. 34.

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[1] But see *infra*, ch. 26, § 4, note.

[2] In the United States, the public lands are conveyed in any method designated by the legislatures; which is ordinarily by deeds of the Land Agents, or persons having charge of that department.

being a party to a deed; and, in many cases, of acquiring or conveying away real property by deed.[1] But a dean, without his chapter, a mayor, without his commonalty, or a master of a college without his fellows, cannot, by executing a deed, bind the corporation. (*a*)

10. All *lay civil corporations* may aliene their lands as freely as individuals; but ecclesiastical and eleemosynary corporations are restrained by statute 1 Eliz. c. 19, and 13 Eliz. c. 10, from every mode of alienation, except that of leasing. In the exercise of this power, they are placed under considerable restric-
14 * tions * by the legislature, of which an account will be given hereafter. (*b*)

11. With respect to the *persons who are incapable of conveying by deed, all* those who *want sufficient age or understanding*, to dispose of their property, and also several others, cannot bind themselves by the execution of a deed.

12. All deeds entered into by *infants*, from which no apparent benefit can arise to them, are either absolutely void, or voidable; that is, the law allows the infant when he comes of age, either to ratify, or confirm, or else to avoid them.[2] And where it is held that the deeds of infants are not void, but voidable, the meaning is, that *non est factum* cannot be pleaded to them, because they have the form, though not the operation of deeds; they are not, therefore, void on that account, without showing some special matter to render them so.[3]

13. Whatever an infant is bound and compellable to do at law, the same shall bind him, although he does it without suit; therefore, where an infant reconveyed lands which had been mort-

(*a*) 1 Inst. 94 b. (*b*) 10 Rep. 30 b. 1 Sid. 162. 1 Ves. & B. 226, 244. Post, ch. 5.

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[1] The power of a corporation aggregate to take, hold, transmit in succession and convey property, is fully and clearly treated in Angell & Ames on Corporations, chs. 5, 6.

[2] In *Ohio*, females are of full age at the age of eighteen years. Rev. St. 1841, ch. 59.

[3] It has been truly observed, by the learned Chancellor Kent, that the tendency of modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule, by which the acts and contracts of infants are deemed voidable only, and subject to their election, when they come of age, either to affirm or disallow them. 2 Kent. Comm. 235.

This remark was cited with approbation by Mr. Justice Story, in delivering the opinion of the Court in Tucker *v.* Moreland, 10 Peters, 58, 71. And on the whole, it is conceived that it may safely be stated, as the result of the American decisions, that

gaged to his father, the mortgage-money having been paid off, the conveyance was held good.

14. A person conveyed the lands in question to W. Cooke and his heirs, by way of mortgage: Cooke afterwards died, leaving J. L. Cooke, an infant, his heir: the mortgage-money was paid off, and the infant joined with his father's executor in conveying the mortgaged premises to a new mortgagee. It was resolved by the Court of King's Bench, that the infant was bound by this conveyance, because it could never operate to his prejudice, and he was compellable to convey. (*a*)

15. *A *female* being capable of *contracting a marriage* *15 *long before the age of twenty-one years*, it has been contended that she ought to be permitted to bind herself by the other parts of the contract; for, as soon as the marriage is had, the principal contract is executed, and cannot be set aside; the estate and capacities of the parties are altered; and the children born of the marriage become interested. But this doctrine has not been assented to by the Court of Chancery.

(*a*) Zouch *v.* Parsons, 3 Burr. 1794. See 2 Prest. Conv. 248, 375. (2 Kent. Comm. 234-236.)

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the act or contract of an infant is in no case to be held purely void, unless, from its nature and solemnity, as well as from the operation of the instrument, it is manifestly and necessarily prejudicial to him. Wherever it *may be* for his benefit, it is at most, but voidable; and if it be an act which it was either his duty to do, or was manifestly for his benefit, it shall bind him. Thus, it is now held that his negotiable promissory note is not void, but only voidable at his election, even though negotiated. Goodsell *v.* Myers, 3 Wend. 479; Reed *v.* Batchelder, 1 Met. 559; Boody *v.* McKenney, 10 Shepl. 523; Fisher *v.* Jewett, 1 Berton, (New Bruns. Rep.) 35; Earle *v.* Reed, 10 Met. 387. So, his bond, Conroe *v.* Birdsall, 1 Johns. Cas. 127, and his statement of an account, are now held not void, but voidable. And see Fant *v.* Cathcart, 8 Ala. 725; Everson *v.* Carpenter, 17 Wend, 419; Best *v.* Givens, 3 B. Monr. 72; Bouchill *v.* Clary, 3 Brevard, 194; Whitney *v.* Dutch, 14 Mass. 457. And so, also, his conveyance of his lands, whether by deed of bargain and sale, or any other mode in common use, *en pais*, in the United States, is treated as voidable only, and not void. See Tucker *v.* Moreland, *supra;* Kendall *v.* Lawrence, 22 Pick. 540; Bool *v.* Mix, 17 Wend. 119; Phillips *v.* Green, 5 Munr. 344; Wheaton *v.* East, 5 Yerg. 41; Moore *v.* Abernathy, 7 Blackf. 442; Dearborn *v.* Eastman, 4 N. Hamp. 441; Boston Bank *v.* Chamberlin, 15 Mass. 220; Jackson *v.* Todd, 6 Johns. 257; 2 Kent, Comm. 234–236; 2 Greenl. Evid. § 367; Story on Contr. § 57, 58, 2d ed. and cases there cited. See, also, Shep. Touchst. 7, note (37) by Hilliard; Bingham on Infancy, ch. 2. [Breed *v.* Judd, 1 Gray, 455; Hardy *v.* Waters, 38 Maine, 450; Carr *v.* Clough, 6 Foster, (N. H.) 280; Ib. 191; Heath *v.* West, 8 Ib. 101; Slocum *v.* Hooker, 13 Barb. Sup. Ct. 536; Dominick *v.* Michael, 4 Sandf. Sup. Ct. 374; Scott *v.* Buchanan, 11 Humph. 468; Ridgeley *v.* Crandall, 4 Md. 435; Knox *v.* Flack, 22 Penn. (10 Harris,) 337.]

16. Lord Macclesfield has said, that if a female infant, on a marriage, with the consent of her guardians, should covenant, in consideration of a settlement, to convey an inheritance to her husband; if this were done in consideration of a competent settlement, equity would execute the agreement, although no action would lie at law to recover damages. (*a*)

17. In a case where a bill was filed for a specific execution of articles, entered into by a female infant, respecting her real estate, previous to and in consideration of marriage, Lord Thurlow is reported to have said—" To decree a specific performance of the articles, the Court must carry the principle to this length, that a wife making a wise settlement in her infancy, on the marriage, without any estate settled on the other side, is bound by the agreement; and that, even if the husband had died, she must have been bound. I cannot think an infant, only covenanting as to her estate, can be bound. If she is so at all, it must be by reference to her marriage. Nobody has yet said that merely by its being upon marriage, she is bound; but it is said that upon a competent settlement she would be bound. I think the Court should not go into the competence of the settlement. I must lay down, that every settlement shall be considered as good till shown to be fraudulent. The cases have not gone so far, nor does my opinion. If she had a settlement from her husband, and, after his death, she had taken possession of it, I think she would be bound by the equity arising from her own act. I say this in deference to Cannel *v.* Buckle, and Harvey *v.* Ashley. I think she is not bound, unless she has availed herself of
16 * the settlement * of the husband. In this opinion, I cannot say the whole property is bound, or decree the articles to be specifically performed." (*b*)

18. Lord Thurlow adhered to this opinion in the following case:

A bill was brought on behalf of the infant children of the marriage, after the husband's death, against his widow, praying that marriage articles might be established and specifically performed, entered into before marriage by Patty Clough, the widow, while an infant, and her guardian, for settling her estate, and lands of her husband, as therein mentioned. She, by her

(*a*) Cannel *v.* Buckle, 2 P. Wms. 243.
(*b*) Durnford *v.* Lane, 1 Bro. C. C. 106. *Ante*, s. 15, 3 Atk. 607.

answer, insisted that she had done nothing after her full age to affirm the articles, therefore that her estates were not thereby bound; waiving any right under the same in the lands of her late husband. The decree declared that her estate was not bound by the marriage articles; and the bill was dismissed without costs. (*a*)

19. It follows that a *deed, executed by a female infant,* though *in consideration of marriage, does not bind her, unless,* (having come of age,) *she assents to it* after the death of her husband.† The acceptance of a jointure may, at first sight, appear to form an exception to this rule. But it has been shown that a woman is not barred of dower by a jointure in consequence of any agreement of hers, but by force of the statute. (*b*)

20. Lord Hardwicke has said that a *female infant* may enter into an agreement, before marriage, respecting her *personal estate,* which must bind her; for such agreement must be in some way beneficial to her, as otherwise her husband would be entitled to it. (*c*)

21. Though a *male infant* cannot in general affect his estate by any deed executed by him, *in consideration of marriage,*‡ yet where a male infant married an adult female, who covenanted that her estate should be limited to certain uses, he was held to be bound by such covenant.

22. A male infant married an adult female, who covenanted *that her estate should be settled to certain uses. *17 Upon a bill filed by the trustees of the settlement, to have it carried into execution by the husband and wife, the husband insisted that, being an infant when he executed the settlement, he was not bound by it. Lord Thurlow said, if a woman before marriage conveys her property, and agrees to settle her general expectations, when they shall fall in, and this be done without

(*a*) Clough *v.* Clough, 8 Woodd. 453. 4 Bro. C. C. 510.
(*b*) May *v.* Hook, tit. 18, c. 2, s. 18. (1 Inst. 246 a, note (1.) Tit. 7, c. 1, s. 38.)
(*c*) 1 Bro. C. C. 111.

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† [The law, after considerable fluctuation of opinion, is now settled, as stated by the author. Milner *v.* Lord Harewood, 18 Ves. 259. Trollope *v.* Linton, 1 Sim. & Stu. 477, 481.]

‡ [Vide Hollingshead *v.* Hollingshead, cited 2 P. Wms. 229, where a covenant by a male infant, to execute a power of appointing a jointure, was held good.—*Note to former edition.*]

any fraud upon the intended husband, such an agreement must be executed; and the husband, when of age, must answer for her contract. It was not, therefore, necessary to discuss the other question, how far the infant husband could be bound by his own contract; for he went upon the covenant of the wife, who was adult. The husband's covenant operated no more than to show his concurrence, and to take away every imputation of fraud from the transaction. (*a*) †

23. It was formerly held that neither an *idiot* nor a *lunatic* could avoid his own deed. It is however now settled, that idiots are incapable of binding themselves by deed; and also lunatics, unless they agree to such deed upon recovering their understanding; and that the heir of an idiot or lunatic may avoid a deed executed by him, by pleading his disability. But if an idiot or lunatic makes a feoffment, and delivers seisin in person, it is not absolutely void, but only voidable. (*b*) [1] ‡

(*a*) Slocombe *v.* Glubb, 2 Bro. C. C. 545.

(*b*) 1 Inst. 247 a. Thompson *v.* Leach, tit. 16, c. 6, § 7. *Infra*, c. 4, § 24. (Beverley's case, 4 Rep. 125 a. Wait *v.* Maxwell, 5 Pick. 217. Jackson *v.* Gumaer, 2 Cowen, 552.)

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[1] But it has been held, that the act of a lunatic done after office found, is void. Pearl *v.* McDowell, 3 J. J. Marsh. 658. [In order to avoid such a deed, the person who was unsound in mind, on being restored to his right mind, must surrender the price, if paid, or the contract for its payment, if unpaid. If, knowing that his grantee is in possession of the land under the deed, he does not enter upon the land, nor give notice of his intention to disaffirm the conveyance, but receives payment of the notes for the price given to him while insane, his intention to ratify and confirm may be inferred; although at the time of receiving such payment, he does not know that he has the power of avoiding the deed, and that by receiving such payment, he will relinquish that power. Arnold *v.* Richmond Iron Works, 1 Gray, 434.]

† [The statute of 7 Ann. c. 19, which enabled infant trustees and mortgagees to convey under the direction of the Court of Chancery or Exchequer, was held only to extend to cases of infants where the trust was expressly declared, and where the infant had nothing to do but to convey, without any ulterior duty to perform beyond the mere conveyance. Att.-Gen. *v.* Pomfret, 2 Cox, 221, 422; Goodwyn *v.* Lister, 3 P. Wms. 387.]

The above statute was repealed by the 6 Geo. 4, c. 74, and that again by the 1 Will. 4, c. 60. The last act consolidates and amends the provisions of the preceding statutes, and applies not only to cases where the infant has a bare trust to convey, (ss. 6–10,) but also to cases of constructive trusts, (ss. 16–18,) or where the infant has a beneficial interest in the trust estate, or where he has an ulterior duty to perform beyond the mere act of conveyance, s. 15.

‡ [The statute 1 Will. 4, c. 60, ss. 3, 28, also enables the committees of idiots, lunatics, and persons of unsound mind, under the direction of the Courts of Chancery in England and Ireland, to convey the estates of which those persons are seised as mortgagees or trustees.

24. * All deeds executed by *married women*, except a queen consort, for the purpose of conveying their estates, are *absolutely void at law*, not merely voidable.† They are also *18

In the sections 8, 31, of the same statute, is an important enactment, that when trustees of any real estate are out of the jurisdiction of the Courts of Chancery in England and Ireland, or it is uncertain, where there are several trustees, which of them was the survivor, or it is uncertain whether the trustee last known to have been seised shall be living or dead, or if known to be dead, but it shall not be known who is his heir, or if any trustee so seised or his heir shall neglect or refuse to convey for twenty-eight days after tender of a proper deed of conveyance, then the Courts of Chancery are empowered to appoint any person they may think proper for that purpose, in the place of the trustee; to convey as effectually as the trustee might. In re Goddard, a mortgagee in fee died intestate as to his real estate, and his heir at law was not known; upon petition that a person might be appointed by the Court to re-convey the estate to the petitioner, (who was entitled to the equity of redemption,) on payment of the mortgage money to the personal representatives of the mortgagee, Sir John Leach, M. R., was of opinion that the eighth section of the above act did not empower him to make the order. His Honor observed that such an order could be made where the heir of a trustee was not known; but the mortgagee, whose heir was not known, was not a trustee.

By the statute 1 Will. 4, c. 65, ss. 28, 40, (repealing 43 Geo. 3, c. 75, s. 1, and 9 Geo. 4, c. 78, s. 1,) the Courts of Chancery in England and Ireland are empowered to order the estates of lunatics to be sold or charged by mortgage for raising money for payment of the debts of the lunatic, and the costs of the commission. Under this act, an order was made in a recent case on the committee of a lunatic, (In re Brand, 1 Mylne & Keen, Rep. 150,) to suffer a common recovery, on behalf of the lunatic, in order to complete the title to a purchaser. The lunatic had no issue, and was tenant in tail in possession, with the immediate reversion to himself in fee.]

† [By stat. 3 & 4 Will. 4, c. 74, for abolishing fines and recoveries, and substituting more simple modes of assurance, provisions are made for the alienation by married women by deed executed in conformity with the requirements of the act. Section 77 of the above act enacts, that after the 31st day of December, 1833, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is made by the act, by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in, or limited, or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do, if she were a feme sole; save and except that no such disposition, release, surrender or extinguishment, shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as thereinafter directed; and it is provided that this act shall not extend to lands held by copy of court roll of or to which a married woman, or she and her husband in her right, may be seised and entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of the act have been effected by her, in concurrence with her husband, by surrender into the

void in equity; and no act of the wife, after the death of her husband, except in the case of a lease, will in general, operate as a confirmation of them. (*a*) [1]

(*a*) 1 Inst. 42 b, n. 4. *Infra*, c. 5.

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hands of the lord of the manor of which the lands may be parcel. By section 78, it is provided that the powers of disposition given to a married woman by the act, shall not interfere with any other powers. Sections 79 to 90, contain provisions for the acknowledgment of such deeds by married women. Section 91, empowers the Court of Common Pleas, in case of the husband being lunatic or otherwise incapacitated as specified in the act, to dispense with the husband's concurrence, except where the Lord Chancellor or other persons entrusted with lunatics, or the Court of Chancery, shall be the protector of a settlement in lieu of the husband.

It is conceived that, by virtue of the above section 77, and section 1 of the act, a married woman (trustee of real estate) may execute a deed of disclaimer.]

[1] In the United States, the law is otherwise; it being the general rule, that a married woman, if of lawful age, may convey her real estate by a deed executed jointly with her husband. 2 Kent, Comm. 150–154. In *Maine*, *New Hampshire*, *Massachusetts*, and *Connecticut*, her acknowledgment of the deed before a magistrate, in the common form, is sufficient; but in nearly or quite all the other States, it is necessary that she be separately and privately examined. Ibid. If the husband joining with her is an alien, the conveyance is nevertheless good. Whiting *v.* Stevens, 4 Conn. R. 44.

[At common law, the deed of a married woman is absolutely void even as against her heirs, although her husband having temporarily deserted her, had been some time absent from the country. Concord Bank *v.* Bellis, 10 Cush. 276; Lowell *v.* Daniels, 2 Gray, 161; Matthews *v.* Puffer, 19 N. H. 448. A deed purported to be made by husband and wife, in the right of the wife. Each of them owned several shares of the property conveyed. The number of shares described to be conveyed was sufficient to include the interest of both. Held, that the deed passed the shares of both husband and wife. Emerson *v.* White, 9 Foster, (N. H.) 482.

A feme covert, to whose separate use land has been conveyed, cannot convey the same by a separate conveyance, differing from the ordinary form, unless such a power is reserved to her in the conveyance. Newlin *v.* Freeman, 4 Ire. Eq. 312.]

The separate examination of the wife, required by the statutes, must be personal, and cannot be by attorney. Dawson *v.* Shirley, 6 Blackf. 531. And the execution of the deed must be her own personal act; if it be signed with her name by the husband, though in her presence and by her direction, it is not a compliance with those statutes which require deeds to be subscribed by the grantor's own hand. Linsley *v.* Brown, 13 Conn. 192. And she cannot convey by attorney. Sumner *v.* Conant, 10 Verm. 9. The certificate of the magistrate must show that in her examination, the requirements of the statute were substantially pursued. Robinson *v.* Barefield, 2 Murph. 390; Ives *v.* Sawyer, 4 Dev. & Bat. 51; Owen *v.* Norris, 5 Blackf. 479; [Jordan *v.* Corey, 2 Carter, (Ind.) 385; Sibley *v.* Johnson, 1 Mann. (Mich.) 380;] and in the absence of fraud, no parol proof is admissible, either to qualify it; Jamison *v.* Jamison, 3 Whart. 457; or to supply its defects or omission. Harrell *v.* Elliott, 1 Tayl. 139; [or to establish the fact that such examination was made. Elwood *v.* Klock, 13 Barb. Sup. Ct. 50.] But in the absence of proof to the contrary, it will be presumed that the magistrate, in conducting the examination, did his duty in making her acquainted with the contents of the deed. Stevens *v.* Doe, 6 Blackf. 475. If the certificate of the magistrate is in

*25. A husband and wife made a mortgage of a share *19
in the New River, which was the estate of the wife, by a demise for 1000 years, by deed. Upon the death of the husband, the wife received the profits, and paid the interest of the mortgage. But she was held not to be bound. (*a*)

(*a*) Drybutter *v.* Bartholomew, 2 P. Wms. 127.

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the regular and legal form, it is conclusive evidence of the facts therein recited. McNeely *v.* Rucker, Ibid. 391. [See Hathaway *v.* Davenport, 2 Jones's Law, (N. C.) 153; Hall et ux. *v.* Chang et al. Ib. 440; Hartley *v.* Frosh, 6 Texas, 208.]

In *Georgia*, the real and personal estate of the wife, upon her marriage, become alike the property of the husband. Rev. Stat. 1845, ch. 16, art. 1, p. 428.

In *Maine*, *New Hampshire*, *Massachusetts*, *Vermont*, and *Michigan*, provision is made by which the wife, if deserted by the husband, without being left by him with the means of support, may be authorized by the courts to sell her real estate, and in several other respects to act as a *feme sole*. In Massachusetts and Michigan, this power may also be given if he is *sentenced* to the State prison. In Maine, it may be given if he is *confined* there. In New Hampshire, it may be given if the desertion has continued for three months; or if she has good cause of divorce against him; or if any cause exists which, by lapse of time, may ripen into just ground of divorce. In Massachusetts, Vermont, and Michigan, it is also requisite that she be of lawful age; which, in Vermont, is for this purpose fixed at eighteen years.

In *Maine* and *Massachusetts*, it is also provided that a married woman, coming into the State to reside, her husband never having lived with her in the State, may make valid conveyances and do other *acts* as a *feme sole*.

See Maine, Rev. St. 1840, ch. 87; N. Hamp. Rev. St. 1842, ch. 149; Mass. Rev. St. 1836, ch. 77; Vermont, Rev. St. 1839, ch. 64; Mich. Rev. St. 1846, ch. 85; *infra*, § 29, note. In *Ohio*, the age of majority of females is fixed at eighteen years. Rev. St. 1841, ch. 59.

In several of the United States, a married woman is habilitated, by statute, to hold property to her own separate use; and to manage and dispose of the same, by gift, deed, or will, as if she were sole. The limitations to these general provisions, it is not deemed material in this place to state. See *New Hampshire*, Stat. 1845, ch. 169; 1846, ch. 231, [327;] *Maine*, Stat. 1844, ch. 117; 1847, ch. 27; 1848, ch. 73; *Massachusetts*, Stat. 1842, ch. 74; 1845, ch. 208; 1846, ch. 209; 1850, ch. 200; [1855, ch. 304;] *Connecticut*, Rev. St. 1849, tit. 7, ch. 1, and tit. 14, ch. 1.

[The Massachusetts Statute of 1845, ch. 208, § 5, confers upon a married woman holding property under the statute, the right and power of conveying such property by deed, subject only to the limitation contained in the seventh section, of the rights of the husband as tenant by the curtesy, or other restrictions or limitations contained in the instrument under which she holds. Beal *v.* Warren, 2 Gray, 447, 459. Under the provisions of the New Hampshire act of 1846, ch. 327, § 4, a *feme covert* cannot contract, and be liable for, debts generally, so as to subject her property to their payment, but her contracts, to be valid, must be confined to, and be connected with, the property itself. Bailey *v.* Pearson, 9 Foster, (N. H.) 77. The Maine Statute of 1847, ch. 27, enacts that a married woman may become the owner of real estate by purchase, &c. &c.; the purchase intended is one made from her own property, or that of others, by their consent, for her use. Merrill *v.* Smith, 37 Maine, (2 Heath,) 396.]

26. The *acknowledgment of a deed* executed by a woman during her marriage, *after the death of her husband*, may, however, in some cases, amount to a *re-delivery* of it, and so render it valid.[1]

27. A man and his wife being entitled to the reversion of a house, in right of the wife, by deed executed by the husband and wife, conveyed it to a person by way of mortgage. After the death of the husband, the wife, by three different papers under her hand, acknowledged the mortgage. It was held, by the Court of K. B., that these papers were equivalent to a re-delivery of the deed. (*a*)

20* *28. A *married woman* may execute *a naked authority;* and a power to convey lands is now frequently given to a married woman, by means of a conveyance to uses. (*b*) †

29. If a husband *abjures the realm*, or is *banished*, he is thereby become *civiliter mortuus;* his wife is considered as a *feme sole;* and may act in all things as if her husband were naturally dead. (*c*) [2]

(*a*) Goodright *v.* Straphan, Cowp. 201.
(*b*) *Vide infra*, c. 18, § 30–48.
(*c*) 1 Inst. 132 b. 2 Vern. 104. 3 P. Wms. 37.

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[1] Husband and wife, being jointly seised of an estate, made a deed of conveyance thereof in fee, which was not acknowledged pursuant to the statute. After the husband's death, the wife acknowledged the deed in due form; and this was held equivalent to an original execution, and passed the estate from the time of the acknowledgment. Doe *v.* Howland, 8 Cowen, 277. And see Lithgow *v.* Kavanagh, 9 Mass. 161; Jourdan *v.* Jourdan, 9 S. & R. 268; Miller *v.* Shackleford, 3 Dana, 289.

† [By the 19th section of the statute 1 Will. 4, c. 60, the husbands of married women who are trustees within the act, are also deemed trustees within its provisions.

By chap. 65 of the statute, passed in the above session, married women are empowered to appoint attorneys on their behalf, for the purpose of appearing and taking admittance of copyholds; and by the 11th section, (having been first privately examined by the lord or his deputy,) to appoint any person as their attorney to surrender their copyhold for the purpose of suffering a customary recovery. The 12th section authorizes married women, under the direction of Courts of Equity in England and Ireland, (s. 37,) and of the Court of Great Sessions in Wales, to surrender leases for the purposes of renewal.]

[2] It has already been stated, *ante*, § 24, note, that, where the husband deserts his wife, making no provision for her support, she may be authorized by the Courts, in several of the United States, by express statutes, to convey her real estate, and to act in several other respects as a *feme sole*. Where these statutory provisions exist, it is conceived that mere desertion, without license from the Court, will not alone authorize her to convey. But the principle is now generally, if not universally, established in the United States, as a necessary exception to the rule of the common law disabling a *feme covert*

30. *Persons attainted* of treason, felony, or *præmunire*, are incapable of conveying away their estates by deed, or otherwise, from the time when the offence was committed. For any conveyance by them subsequent to that event, would tend to defeat the king of his forfeiture, and the lord of his escheat. (*a*) † [1]

*31. By the common law, *all persons* whatever *may be* *21
grantees in a deed, because it is supposed to be for their benefit. But *infants*, *married women*, and persons of *insane memory*, may *disagree* to such deeds, and waive the estates thereby conveyed to them; as will be shown hereafter. (*b*)

32. An *alien may be grantee* in a deed, though he cannot hold the land; for upon office found the king shall have it by his prerogative.[2] If an alien be made a denizen, he then becomes

(*a*) 1 Inst. 390 b. (*b*) 1 Inst. 2. (*Infra*, ch. 27.)

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to contract or sue alone, that where the husband was never within the State, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make contracts, and sue and be sued, as a *feme sole*. Gregory *v.* Pierce, 4 Met. 478. The same principle, it is conceived, will enable her to convey her own real estate, where no other provision has been made by statute. The principle of this exception was fully discussed, and the cases examined, by Putnam, J., in Gregory *v.* Paul, 15 Mass. 31. And see Abbot *v.* Bagley, 6 Pick. 89; King *v.* Paddock, 18 Johns. 141; Bean *v.* Morgan, 4 McCord, 148; Cusack *v.* White, 2 Rep. Const. C. 279; Valentine *v.* Ford, 2 Browne, 193; Boyce *v.* Owens, 1 Hill, S. Car. Rep. 8; Robinson *v.* Reynolds, 1 Aik. 174; Arthur *v.* Broadnax, 3 Ala. R. 557.

"But," said Chief Justice Shaw, "to accomplish this change in the civil relations of the wife, the desertion by the husband must be absolute and complete; it must be a voluntary separation from, and abandonment of the wife, embracing both the fact and intent of the husband to renounce *de facto*, and as far as he can do it, the marital relation, and leave his wife to act as a *feme sole*. Such is the renunciation, coupled with a continued absence in a foreign state or country, which is held to operate like an abjuration of the realm." 4 Met. 479.

† [By the statute 54 Geo. 3, c. 145, "no attainder for felony, except in the cases of the crime of high treason, or of the crimes of petit treason or murder, or of abetting, procuring or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his, her, or their natural lives only; and that it shall be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained if no such attainder had been, to enter into the same."

It would appear that this act leaves the offender the power of disposing of his estate in reversion expectant upon his decease.]

[1] There is no forfeiture, in the United States, for felony; and in only a few States for treason. See *ante*, tit. 1, § 67, note; tit. 29, ch. 2, § 21, note; tit. 30, § 11, note.

[2] Fairfax *v.* Hunter, 7 Cranch, 603; Jackson *v.* Lunn, 3 Johns. Cas. 109; Orr *v.*

capable of holding lands purchased after his denization. But it seems that, if an alien purchases land, and before office found, the king makes him a denizen and confirms his estate, the confirmation will be good. [But although the act of naturalization may, either by special reference or by general words having a retrospective import, confirm a conveyance by the alien made previously to his naturalization, nevertheless an act of naturalization in the ordinary form, will not of itself operate so as to confirm such prior conveyance.] (*a*)

33. *A wife* cannot, by the common law, be the *immediate grantee of her husband;* but she may take an estate from him through the medium of the Statute of Uses.[1] Thus, a man may covenant with others to stand seised to the use of his wife; or make a feoffment, or other conveyance, to the use of his wife. (*b*)

34. In consequence of the several *statutes against mortmain, all corporations*, whether lay and civil, or religious and eleemosynary, have for a long time been *incapable of taking lands by deed*, without an express and positive *license from the Crown.* †

22* *But as these statutes did not extend to charitable uses, lands might still be given for the maintenance of a school, hospital, or other purpose of that nature. (*c*) [2]

35. To restrain the abuses arising from an unlimited power of

(*a*) *Idem.* Golds. 29. Fish *v.* Klein, 2 Mer. 431.
(*b*) 1 Inst. 112 a. Tit. 11, c. 3. *Infra*, c. 18.
(*c*) 7 & 8 Wm. 3, c. 37. 1 Woodd. 494.

Hodgson, 4 Wheat. 453. As to the ability of aliens to take and hold lands in the United States, see *ante*, tit. 1, § 39, note (2.)

[1] See accordingly, Martin *v.* Martin, 1 Greenl. 394; Abbott *v.* Hurd, 7 Blackf. 510; Sweat *v.* Hall, 8 Verm. 187. But such a conveyance will be upheld in equity. Wallingford *v.* Allen, 10 Peters, R. 583; *ante*, tit. 11, ch. 3, § 24.

[2] In *Pennsylvania*, all lands in that State, acquired, without the license of the Commonwealth, by purchase or in any other manner, by any incorporated company, or by individuals for the use of such company, whether it were incorporated by that or a foreign State, are liable to forfeiture. Dunlop's Dig. ch. 447, p. 567, 2d ed. In the other States, it is understood, as Chancellor Kent observes, that the statutes of mortmain have not been reënacted or recognized in practice; but the inference from the statutes, creating corporations and authorizing them to hold real estate to a certain limited extent, is, that our statute corporations cannot take and hold real estate for purposes foreign to their institution. 2 Kent, Comm. 283. And see *ante*, tit. 11, ch. 2, § 15, note; Angell and Ames on Corporations, p. 90, 2d ed.

† [Sir W. Blackstone says that even a license from the Crown is not in all cases sufficient. 1 Comm. 479.—*Note to former edition.*]

conveying lands to charitable uses, it was enacted by the statute 9 Geo. II. c. 36, that no lands or tenements, or money to be laid out thereon, shall be given for, or charged with, any charitable use whatever, unless such gift be made by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of the donor, or grantor, including the days of the execution and death, and be enrolled in Chancery, within six calendar months next after the execution thereof; and unless the same be made to take effect in possession, for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever for the benefit of the donor, or grantor, or of any person or persons claiming under him; and that all other gifts shall be void. (*a*)

*36. II. At common law, a *consideration* was *not essentially necessary* to the validity of a deed. Thus in Plowden, it is said *arguendo* that, by the law of England, there were two ways of making contracts for lands or chattels; the one by words, the other by writing: and because words were often spoken inadvisedly, and without deliberation, the law had provided that a contract by words should not bind without consideration. But where the agreement was by deed, there was more time for deliberation; for which reason deeds were received as a lien final to the party, and were adjudged to bind him, without examining upon what cause or consideration they were made. (*b*) *23

37. Thus, in 17 Edw. IV. where a person promised by deed to give another twenty pounds, it was held that an action of debt lay upon the deed; and that the consideration was not examinable: for in the deed there was a sufficient consideration, namely, the will of the party who made the deed. A doctrine which has been assented to in modern times. (*c*)

38. It should however be observed, that though a deed entered

(*a*) Highmore on Mortmain. Grieves *v.* Case, 2 Cox, R. 301. Doe *v.* Waterton, 3 Barn. & Ald. 149.

(*b*) Plowd. 308. Bac. Read. 13.

(*c*) Year Book, Trin. 17 Ed. 4, 4 b. 2 Atk. 150. 8 Burr. 1670. 7 Term R. 350, note.

The subject of conveyances to a corporation in trust for charitable and pious uses, and of the power of Chancery over such trusts, independent of the statute of 43 Eliz. ch. 4, was very fully considered in Vidal *v.* Girard's Executors, 2 How. S. C. Rep. 127. [See also Fontain *v.* Ravenel, 17 How. U. S. 369.]

into *without any consideration*, is *valid at law between the parties*; yet in many cases it is *void as to strangers*. It may therefore be laid down generally, that a *consideration is necessary* to render a deed valid against *all persons*. (*a*) [1]

39. The *Court of Chancery* will not lend its aid to carry a deed into execution, unless it is supported by *some consideration*. For "equity is remedial only to those who come in upon an actual consideration. So that although a voluntary conveyance, which is good in law, is sufficient likewise in equity; yet a voluntary defective conveyance, which cannot operate at law, is not helped in equity, in favor of a bare volunteer; where there is no consideration expressed or implied." (*b*) [2]

(*a*) *Infra*, c. 27.

(*b*) Treat. of Eq. B. 1, c. 5, s. 2. Osgood *v.* Strode, 2 P. Wms. 245. 1 Ves. 54. *Vide infra*, c. 27.

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[1] Beyond this use of a consideration, the only operation of the clause expressing the payment of it is, to prevent a resulting trust to the grantor, and to estop him from denying the making and effect of the deed for the uses therein declared; but it is not conclusive against the grantee, to prevent him, in an action of covenant against the grantor, from proving the payment of a greater sum of money than is expressed in the deed. Belden *v.* Seymour, 8 Conn. R. 304; Meeker *v.* Meeker, 16 Conn. R. 383; Beach *v.* Packard, 10 Verm. 96; Hurn *v.* Soper, 6 Har. & J. 276; Grout *v.* Townsend, 2 Hill, 554; 2 Denio, 336; [Graves *v.* Graves, 9 Foster, (N. H.) 129.]

If no consideration is expressed, any lawful consideration may be averred, and found by the jury. Stearns *v.* Barrett, 1 Pick. 443, 449; Pott *v.* Todhunter, 2 Collyer, Ch. Cas. 76, 84. But not to raise a use, where none is declared in the deed. Storer *v.* Batson, 8 Mass. 442, 443. And where any consideration is expressed in the deed, it is held, as a general rule, that any other consideration, not inconsistent with that which is expressed, may be averred and proved; as, if a valuable consideration is expressed, a good one also may be shown. Wallis *v.* Wallis, 4 Mass. 135; Stearns *v.* Barrett, 1 Pick, 443, 449; Storer *v.* Batson, *supra;* Cromwell's case, 2 Rep. 76; Toulmin *v.* Austin, 5 Stew. & Port. 410; Hayden *v.* Mentzer, 10 S. & R. 329; Robbins *v.* Love, 3 Hawks, 82; Emmons *v.* Littlefield, 1 Shepl. 233; Swisher *v.* Swisher, Wright, R. 755; [Hedley *v.* Briggs, 2 R. I. 489; Spalding *v.* Brent, 3 Md. Ch. Decis. 411; Ibid. 461; Davidson *v.* Jones, 26 Miss. (4 Cushm.) 26.] But see Betts *v.* Union Bank, 1 H. & G. 175. But in *New York*, this rule has been limited to cases where it is said in the deed that it is "for other considerations" also; it being held, that where these or the like words are wanting, no other consideration shall be shown. Maigley *v.* Hauer, 7 Johns. 341; Jackson *v.* Delancey, 4 Cowen, 427.

If the recital is of "a certain sum of money," without saying how much, it is sufficient. Jackson *v.* Schoonmaker, 2 Johns. 330.

That the grantor in an action brought to recover the price of the land, is not estopped by the recital of payment of the consideration-money, in his deed, see 1 Greenl. on Evid. § 26, note. But in an action on the covenant of warranty brought by an *assignee* of the grantee, the grantor is estopped to say that the consideration paid was *less* than is recited in the deed. Greenvault *v.* Davis, 4 Hill, 643.

[2] See Story on Eq. Jur. Vol. I. § 433; Vol. II. § 787, 793 *a*, 973, 987; Bunn *v.*

40. There must be not only a consideration in equity, as a motive for relief, but it must be a stronger consideration than what is on the other side. For if it is only equal, then the balance will incline neither way, and the Court will not interfere. * Thus, where there are two conveyances, without consideration, of the same lands, the Court of Chancery will not relieve the latter against the former: so that in such case he who has the legal estate will hold it. (*a*) *24

41. There are some deeds deriving their effect from the *Statute of Uses;* namely a *bargain and sale*, and a *covenant to stand seised to uses;* to the *first* of which a *pecuniary* consideration, and to the *second* a *good* consideration, is absolutely *necessary;*[1] otherwise they are void. (*b*)

42. *Considerations* are of *two kinds*, *civil* and *moral.* The *first*, which is usually called a *valuable consideration*, is *money*, or any *other thing* that bears a *known value. Marriage* also forms a valuable consideration.[2] The *second*, which is called a *good consideration*, arises from an *implied obligation;* such as that which subsists between a *parent and child;*[3] for children are considered

(*a*) Treat. of Eq. B. 1, c. 5, § 3. (Story on Eq. Jur. Vol. II. § 787, 798 a, 973, 987.) Goodwin *v.* Goodwin, 1 Rep. in Cha. 173.

(*b*) *Infra*, c. 9 & 10.

Winthrop, 1 Johns. Ch. 336. [Gross inadequacy of consideration is sufficient to prevent a decree for specific performance. Robinson *v.* Robinson, 4 Md. Ch. Decis. 176.]

[1] A covenant to stand seised may be well founded on either a good or a valuable consideration. But if it be founded on the latter, it becomes, in effect, a bargain and sale, and therefore must have all its attributes; as, for example, it can be to the use of no one but the bargainee; and no other use can be limited upon this use. Welch *v.* Foster, 12 Mass. 93.

[2] A bond to the grantor, or a covenant to perform services for him, is a valuable consideration. Whelan *v.* Whelan, 3 Cow. 537; Seward *v.* Jackson, 8 Cow. 406; Young *v.* Ringo, 1 Monr. 30. So is the compromise of a doubtful right or claim. Rice *v.* Bixler, 1 Watts & S. 445. So, the liability of the grantee as surety for the grantor. Buffum *v.* Green, 5 N. Hamp. R. 71. So, if it be declared to be made in pursuance of a decree in Chancery. Porter *v.* Robinson, 3 A. K. Marsh, 253.

For the purpose of raising a use, the words, "for value received," have been held to import a sufficient consideration. Jackson *v.* Alexander, 3 Johns. 484.

The receipt of the wife's property by the husband, is a sufficient consideration for the conveyance of land to her use. Hill *v.* West, 8 Ham. 222.

[3] Or, between a grandparent and grandchild. Hansom *v.* Buckner, 4 Dana, 251; Stovall *v.* Barnett, 4 Litt. 207. But not between a father and his illegitimate child. Blount *v.* Blount, 2 Law Rep. 587. [Services rendered by children to their father while residing with him, without any agreement for compensation, do not constitute a valuable consideration of a deed, as against creditors. Sanders *v.* Wagonseller, 19

in equity as creditors, claiming a debt, founded on the moral obligation of the parent to provide for his child. The *love and affection* which a man is naturally supposed to bear to his *brothers* and *sisters*, *nephews* and *nieces*, and *heirs at law;* and the desire of preserving his name and family, are also held to be good considerations. (*a*)

43. The *payment of a man's debts* [1] is deemed a *good consideration;* as every man is under a moral obligation of satisfying his lawful creditors. But considerations which are *against the policy of the law*, the principles of justice, or the rules of morality, are *utterly void;* it being a rule both of law and equity, that, *ex turpi contractu actio non oritur.* (*b*)

44. A *consideration* is either *express* or *implied.* An *express consideration* is where the motive or inducement of the parties to a deed, is distinctly declared. A consideration is *implied* where an act is done or forborne at the request of another, without any express stipulation; in which case the law presumes an adequate compensation for the act of forbearance, to have been the inducement of the one party and the undertaking of the other. (*c*) [2]

45. III. The *third circumstance* necessary to a deed is, that it be *written or printed* on *paper or parchment*; although it may be in *any language* or *character* whatever. If it be written on stone, board, linen, leather, or the like, it is no deed. Wood and stone,

(*a*) (1 Story on Eq. Jur. § 354.)
(*b*) *Infra*, c. 27.
(*c*) Treat. of Eq. B. 1, c. 5, s. 1.

Penn. (7 Harris,) 248. It is a sufficient consideration for a conveyance of an heir's reversionary interest in land, that the grantee, who is devisee under a will of the ancestor, will consent to the disallowance of such will. Larrabee *v.* Larrabee, 34 Maine, (4 Red.) 477. The seduction of an innocent woman by a pretended marriage, is a valuable consideration for a deed subsequently made to her and her children. Doe *v.* Horn, 1 Carter, (Ind.) 363.]

[1] That is the *intent* to pay, on the part of the grantor; for the actual payment by the grantee is a valuable consideration.

[2] Ordinarily, and in the absence of any positive statute, a consideration is not necessary to the validity of a deed, as between the parties; Green *v.* Thomas, 2 Fairf. 318; Rogers *v.* Hillhouse, 3 Conn. 398; and of course, none need be expressed. Jackson *v.* Dillon, 2 Overt. 261. When it becomes necessary to prove one, it may be shown by parol. Jackson *v.* Pike, 9 Cowen, 69; Wood *v.* Beach, 7 Verm. 522; White *v.* Weeks, 1 Penn. 486. Parol evidence is also admissible, in favor of the grantee, to prove that the consideration-money actually paid by him was more than is expressed in the deed. Curry *v.* Lyles, 2 Hill, S. Car. Rep. 404; Jack *v.* Dougherty, 3 Watts, 151. But the grantor, in an action on his covenant of warranty, brought by a remote grantee, is estopped to say it was less. Greenvault *v.* Davis, 4 Hill, 643.

says Sir W. Blackstone, may be more durable, and linen less *liable to erasures; but writing on paper or parch- *25
ment unites in itself, more perfectly than in any other way, both these desirable qualities; for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable. (*a*)

46. All the matter and form of a deed must be *written before the sealing and delivery* of it. For if a man seals and delivers an empty piece of parchment or paper, though he at the same time give directions that an agreement shall be written above, which is accordingly done, yet it is not a good deed. (*b*)[1]

(*a*) 1 Inst. 229 a, 2 Bl. Com. 297. (*Supra*, ch. 1, § 16, note.) (*b*) Shep. Touch. 54.

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[1] In Texira *v.* Evans, cited 1 Anstr. 228, where one executed a bond in blank, and sent it into the money-market to raise a loan upon, and it was negotiated, and filled up by parol authority only, Lord Mansfield held it a good bond. This decision was questioned by Mr. Preston, in his edition of Shep. Touchst. p. 68, and it was expressly overruled in Hibblewhite *v.* Morine, 6 M. & W. 215. It is also contradicted by McKee *v.* Hicks, 2 Dev. Law R. 379, and some other American cases. [Ingram *v.* Little, 14 Geo. 173.] But it was confirmed in Wiley *v.* Moor, 17 S. & R. 438; Knapp *v.* Maltby, 13 Wend. 587; Commercial Bank of Buffalo *v.* Kortwright, 22 Wend. 348; Boardman *v.* Gore, 1 Stewart, Alab. R. 517; Duncan *v.* Hodges, 4 McCord, 239; and in several other cases the same doctrine has been recognized. In The United States *v.* Nelson, 2 Brockenbrough, R. 64, 74, 75, which was the case of a paymaster's bond, executed in blank, and afterwards filled up, Chief Justice Marshall, before whom it was tried, felt bound by the weight of authority, to decide against the bond; but expressed his opinion, that in principle it was valid, and his belief that his judgment would be reversed in the Supreme Court of the United States; but the cause was not carried further. Instruments executed in this manner have become very common, and the authorities, as to their validity, are distressingly in conflict. But upon the principle adopted in Hudson *v.* Revett, 5 Bing. 368, there is very little difficulty in holding such instruments valid, and thus giving full effect to the actual intentions of the parties, without the violation of any rule of law. In that case, the defendant executed and delivered a deed, conveying his property to trustees, to sell for the benefit of his creditors, the particulars of whose demands were stated in the deed; but a blank was left for one of the principal debts, the exact amount of which was subsequently ascertained and inserted in the deed, in the grantor's presence, and with his assent, by the attorney who had prepared the deed and had it in his possession, he being one of the trustees. The defendant afterwards recognized the deed as valid, in various transactions. It was held that the deed was not intended to be a complete and perfect deed, until all the blanks were filled, and that the act of the grantor, in assenting to the filling of the blank, amounted to a delivery of the deed, thus completed. No formality, either of words or action, is prescribed by the law as essential to delivery. Nor is it material how or when the deed came into the hands of the grantee. Delivery, in the legal sense, consists in the transfer of the possession and dominion; and whenever the grantor

47. The *blanks* in a deed may, however, if *not very material*, be filled up after its execution. (*a*)

48. A deed of revocation, and a new settlement made by that deed, though after the sealing and execution thereof, blanks were filled up, and not read again to the party, or resealed and executed, was held good. (*b*)

49. A deed must also have the *regular stamps*, required by the several statutes made for that purpose, otherwise it cannot be given in evidence. It should, however, be observed, that the

(*a*) Hudson *v.* Revett, 5 Bing. 368.

(*b*) Paget *v.* Paget, 2 Rep. in Cha. 187. Doe *v.* Bingham, 4 Barn. & Ald. 672.

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assents to the possession of the deed by the grantee, as an instrument of title, then, and not until then, the delivery is complete. The possession of the instrument by the grantee may be simultaneous with this act of the grantor's mind, or it may have been long before; but it is this assent of the grantor which changes the character of that prior possession, and imparts validity to the deed. Mr. Preston observes, that "all cases of this sort depend on the inquiry whether the intended grantor has given sanction to the instrument, so as to make it conclusively his deed." 3 Preston on Abstracts, p. 64. And see Parker *v.* Hill, 8 Metc. 447; Hope *v.* Harman, 11 Jur. 1097; Post, Vol. II. § 297. The same effect was given to clear and unequivocal acts of assent *en pais*, by a feme mortgagor, after the death of her husband, as amounting to a redelivery of a deed of mortgage, executed by her while a feme covert. Goodright *v.* Straphan, Cowp. 201, 204; Shep. Touchst. by Preston, p. 58. "The general rule," said Mr. Justice Johnson, in delivering the judgment of the Court, in Duncan *v.* Hodges, "is, that if a blank be signed, sealed, and delivered, and afterwards written, it is no deed; and the obvious reason is, that as there was nothing of substance contained in it, nothing could pass by it. But the rule was never intended to prescribe to the grantor the order of time, in which the several parts of a deed should be written. A thing to be granted, a person to whom, and the sealing and delivery, are some of those which are necessary, and the whole is consummated by the delivery; and if the grantor should think proper to reverse this order, in the manner of execution, but in the end makes it perfect before the delivery, it is a good deed." See 4 McCord, R. 239, 240. Whenever, therefore, a deed is materially altered, by consent of the parties, after its formal execution, the grantor or obligor assents that the grantee or obligee shall retain it in its altered and completed form, as an instrument of title; and this assent amounts to a delivery, or redelivery, as the case may require, and warrants the jury in finding accordingly. Such plainly was the opinion of the learned Judges in Hudson *v.* Revett, as stated by Best, C. J., in 5 Bing. 388, 389; and further expounded in West *v.* Steward, 14 M. & W. 47. See, also, Hartley *v.* Manson, 4 M. & G. 172; Story on Bailments, § 65. See 1 Greenl. on Evid. § 568 a, note (9); Masters *v.* Miller, 1 Anstr. 229; Ex parte Decker, 6 Cowen, 59; Ex parte Kerwin, 8 Cowen, 118; Hale *v.* Russ, 1 Greenl. 334; Gordon *v.* Jeffreys, 2 Leigh, R. 410; Vanhook *v.* Barrett, 4 Dev. Law R. 272; Clap *v.* Smith, 16 Pick. 247; Fullerton *v.* Harris, 8 Greenl. 393, 397. But by this last case it appears that the official approval of a bond required by law, before all the material blanks are filled, is void. And see, to this point, the precedent cited in Stephen on Pleading, p. 192, 194, (1st Am. ed.)

laws which require all deeds to be stamped, do not prevent their legal effect and operation, but only suspend their being pleaded, or given in evidence, or admitted in any court to be good, useful, or available, till the duty and penalty be paid, and the deed properly stamped. The omission of the stamps in the first instance, is therefore immaterial, if the deed be afterwards duly stamped. (*a*)

50. IV. The *fourth circumstance* necessary to a deed, is that there be *words sufficient* to specify the agreement, and bind the parties, *legally and orderly set forth.* That is, there must be words sufficient to signify the terms and conditions of the agreement, and to bind the parties; which sufficiency must be left to the law to determine.[1]

51. Ancient deeds were extremely short, and suited to the simplicity of the times; but when deeds grew more complicated, it became customary to divide them into several formal parts; and although it is not absolutely necessary that a deed should be divided in this manner, provided there are sufficient words to show the meaning and intention of the parties, yet as these formal and orderly parts are calculated to convey that meaning in the clearest, most distinct, and effectual manner, and have *been well considered and settled by the wisdom of *26 successive ages, it is prudent not to depart from them without good reason, or urgent necessity. (*b*)

52. These *formal and orderly parts*, are, 1. The *premises*, which contain all that part preceding the *habendum;* that is, the date, the parties' names and descriptions, the recital, the consideration and receipt thereof, the grant, the description of the things granted, and the exception, if any. 2. The *habendum*, which declares what estate or interest is granted, though that may be also done in the premises. But the description of the things granted need not be repeated in the *habendum*, as it is sufficient that they are described in the premises. 3. The *tenendum*, which was formerly used to express the tenure by which the estate granted was to be held; but since all freehold tenures have

(*a*) Fearne's Post. Works, 411. (See 2 Stark. Evid. tit. Stamps, p. 754–773, 6th Am. ed.)
(*b*) 1 Inst. 6 a.

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[1] See *ante*, tit. VI. ch. 4, § (14.) *Post*, ch. 21, § 10, note.

been converted into socage, the *tenendum* is of no further use, and is therefore joined to the *habendum.* 4. The *reddéndum*, which is that whereby the grantor reserves some new thing to himself, out of what he had granted before. 5. The *condition*, which has been treated of in a former title. 6. The *warranty*, which is described by Lord Coke to be "a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same; and either upon voucher or judgment in a *warrantia chartæ*, to yield other lands and tenements, to the value of those that shall be evicted by a former title; or else may be used by way of rebutter." (*a*) 7. The *covenant*, which is an agreement by which one of the parties obliges himself to do something beneficial to, or abstain from something, which, if done, might be prejudicial to another of the parties. 8. The *conclusion*, which mentions the execution, and the date, either expressly or by reference to the beginning.

53. V. The *fifth circumstance* necessary to a deed is, that it be *read, if any of the parties require it;* if not, the deed will be void, as to the party requiring it to be read. If a person can, he should read it himself; if he be *blind*, or *illiterate*, some other should read it for him. If it be *read falsely*, it will be void, at least for so much as was misread, unless it be agreed by collusion, that the deed should be read falsely, on purpose to make it void; for in such case it will bind the fraudulent party. (*b*) [1]

54. VI. The *sixth circumstance* required is, *sealing*, and, in most cases, *signing*.[2] Upon the establishment of the Nor-

(*a*) 1 Inst. 365 a.

(*b*) Manser's case, 2 Rep. 3. Thoroughgood's case, Id. 14. Shulter's case, 12 Rep. 90. Anon. Skin. 159. 2 Atk. 327. 1 Neville & Man. R. 576.

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[1] [A person is presumed to know the contents of any instrument he signs, and also the date; and if it has no date, he is presumed to know that fact. Androscoggin Bank *v.* Kimball, 10 Cush. 373.]

[2] If a seal has been affixed to an instrument by mistake, it will not be deemed a deed, but only an agreement. Thus, where *assumpsit* was brought for seamen's wages, on articles under seal, "to which the parties have set their hands," without saying "seals," the Judge refused to nonsuit the plaintiff, it appearing that he did not intend to contract by deed. Clement *v.* Greenhouse, 5 Esp. R. 83.

But on the other hand, if it appear that the parties intended to execute an instrument under seal, and it is actually signed and sealed, but in the *testimonium* clause the words "and seals" are omitted, it is nevertheless good. Bradford *v.* Randall, 5 Pick.

mans, in *England, the practice of authenticating all *27
written instruments by waxen seals only, was introduced; and in the reign of Edw. I. every freeman, and such of the most substantial villeins as were fit to be put upon juries, had their particular seals. (*a*)[1]

(*a*) 2 Bl. Comm. 306.

496; Peters *v.* Field, Hetl. 75; [Wing *v.* Chase, 35 Maine, (5 Red.) 260]. So, if it be signed and sealed, it is a good deed, though the *testimonium* clause be wholly omitted. Anon. Dyer, 19 a. And see Taylor *v.* Glaser, 2 S. & R. 504.

[1] The nature of a seal, and the object of the law in requiring its use, was discussed by Kent, C. J., with his usual affluence of learning, in Warren *v.* Lynch, 5 Johns. 245–247. "A seal," says he, "according to Lord Coke, (3 Inst. 169,) is a wax impression. *Sigillum est cera impressa, quia, cera sine impressione non est sigillum.* A scrawl with the pen is not a seal, and deserves no notice. The law has not indeed declared of what precise materials the wax shall consist; and whether it be a wafer or any other paste or matter sufficiently tenacious to adhere and receive an impression, is perhaps not material. But the scrawl has no one property of a seal. *Multum abludit imago.* To adopt it as such would be at once to abolish the immemorial distinction between writings sealed, and writings not sealed. Forms will frequently, and especially when they are consecrated by time and usage, become substance. The calling a paper a deed will not make it one, if it want the requisite formalities. 'Notwithstanding,' says *Perkins*, (sect. 129,) 'that words obligatory are written on parchment or paper, and the obligor delivereth the same *as his deed*, yet if it be not sealed, at the time of the delivery, it is but an *escrowl*, though the name of the obligor be subscribed.' I am aware that ingenious criticism may be indulged at the expense of this and of many of our legal usages; but we ought to require evidence of some positive and serious public inconvenience, before we, at one stroke, annihilate so well-established and venerable a practice as the use of seals in the authentication of deeds. The object in requiring seals, as I humbly presume, was misapprehended both by President *Pendleton*, and by Mr. Justice *Livingston*. It was not, as they seem to suppose, because the seal helped to designate the party who affixed it to his name. *Ista ratio nullius pretii*, (says *Vinnius*, in Inst. 2, 10, 5,) *nam et alieno annulo signare licet.* Seals were never introduced or tolerated in any code of law, because of any family impression, or image, or initials which they might contain. One person might always use another's seal, both in the *English* and in the *Roman* law. The policy of the rule consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed, and frauds less likely to be practised upon the unwary. President *Pendleton*, in the case of *Jones* and *Temple* v. *Logwood*, 1 Wash. Rep. 42, which was cited upon the argument, said that he did not know of any adjudged case that determines that a seal must necessarily be something impressed on wax; and he seemed to think that there was nothing but Lord *Coke's* opinion to govern the question. He certainly could not have examined this point with his usual diligence. The ancient authorities are explicit, that a seal does, in legal contemplation, mean an impression upon wax. 'It is not requisite,' according to *Perkins*, (sect. 134,) 'that there be for every grantor who is named in the deed a several piece of wax, for one piece of wax may serve for all the grantors, if every one put his seal upon the same piece of wax.' And *Brooke*, (tit. Faits, 30 and 17,) uses the same language. In

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55. Sealing alone was sufficient to authenticate a deed till the reign of King Charles II. and is still absolutely necessary; for no

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Lightfoot and *Butler's* case, which was in the Exchequer, 29 *Eliz.* (2 Leon. 21,) the Barons were equally explicit, as to the essence of a seal, though they did not all concur upon the point, as stated in *Perkins.* One of them said that twenty men may seal with one seal upon one piece of wax only, and that should serve for them all, if they all laid their hands upon the seal; but the other two Barons held that though they might all seal a deed with one seal, yet it must be *upon several pieces of wax.* Indeed this point, that the seal was an impression upon wax, seems to be necessarily assumed and taken for granted in several other passages which might be cited from *Perkins* and *Brooke*, and also in Mr. *Selden's Notes to Fortescue;* (De Laud. p. 72,) and the nature of a seal is no more a matter of doubt in the old *English* law, than it is that a deed must be written upon paper or parchment, and not upon wood or stone. Nor has the common law ever been altered in *Westminster Hall* upon this subject; for in the late case of *Adam* v. *Kear*, 1 Bos. and Puller, 360, it was made a question whether a bond executed in *Jamaica*, with a scrawl of the pen, according to the custom of that island, should operate as such in *England*, even upon the strength of that usage.

"The *civil law* understood the distinction and solemnity of seals as well as the common law of *England.* Testaments were required not only to be subscribed, but to be sealed by the witnesses. *Subscriptione testium, et ex edicto prætoris, signacula testamentis imponerentur,* (Inst. 2, 10, 3.) The *Romans* generally used a ring, but the seal was valid in law, if made with one's own or another's ring; and, according to *Heineccius*, (*Elementa juris civilis secundum ord. Inst.* 497,) with any other instrument, which would make an impression, and this, he says, is the law to this day throughout *Germany.* And let me add, that we have the highest and purest classical authority for Lord *Coke's* definition of a seal; *Quid si in ejusmodi cera centum sigilla hoc annulo impressero?* (Cicero, Academ. Quæst. Lucul. 4, 26." See also, Bradford *v.* Randall, 5 Pick. 496. 4 Kent, Comm. 452.

The common law, however, in regard to the manner of sealing, has been considerably changed in the United States, both by statute and by usage; it being the practice, in many States, to make a circular scrawl with ink, with or without the letters L. S. or the word *seal* within it, to serve instead of an impression on wax or a wafer; and on legal processes and official documents, the official seal impressed on the paper alone, is in many States practised and deemed sufficient.

In *Maine, New Hampshire, Vermont*, and *Massachusetts*, the impression of the seal on the paper only, without wax or wafer, is made sufficient, by statute, in all legal processes and official documents. Maine, Rev. St. 1840, ch. 1, § 15; N. Hamp. Rev. St. 1842, ch. 1, § 9; Vermont, Rev. St. 1839, ch. 4, § 13; Mass. Rev. St. 1836, ch. 2, § 15. In *New York*, this method is allowed by statute, on the acts and deeds of corporations. N. York, Stat. Apr. 7, 1848, ch. 197.

In *New Jersey*, the scrawl or scroll is a sufficient seal, on "any instrument for the payment of money." N. Jersey, Rev. St. 1846, tit. 29, ch. 2, p. 801.

But in all the above-named States, as well as in *Connecticut* and *Rhode Island*, the common-law idea of a seal, in regard to private instruments of conveyance, admitting, however, the use of a wafer instead of wax, universally prevails.

[A seal by a wafer or other tenacious substance upon which an impression is, or may be made, is a valid seal to a deed. Tasker *v.* Bartlett, 5 Cush. 359.]

By the statutes of *Ohio, Michigan, Indiana, Illinois, Missouri, Kentucky, Florida,*

written agreement is considered as a deed unless it be sealed. But if a stranger seal an instrument by the allowance, or the commandment precedent, or agreement subsequent, of the person who is to seal it, that is sufficient. Therefore, if another man seal a deed of mine, and I take it up after it is sealed, and deliver it as my deed, this is said to be a good agreement to, and allowance of, the sealing, and so a good deed. So if the party seal the deed with any seal beside his own, or with a stick, or any thing else, it is equally good. (*a*)

56. Perkins says, it is not requisite that there be for every grantor, &c., who is named in the deed, a several piece of wax; for one piece of wax may serve for all the grantors, &c., which are named in the deed, if every one of them put his seal upon the same piece of wax, or if another do so for them, if the words of the deed imply so much; that is, if it be said in the deed *in cujus rei testimonium sigilla nostra apposuimus*, or words to that effect. (*b*) [1]

57. One of the incidents to every corporation, is to have a

(*a*) Perk. s. 130.

(*b*) Perk. s. 134. (Mackay *v.* Bloodgood, 9 Johns. 285. Bank of Cumberland *v.* Bugbee, 1 Applet. 27. Pequawkett Bridge *v.* Mathes, 7 N. Hamp. 230. Townsend *v.* Orcutt, 4 Hill, 351.)

Arkansas, Tennessee, and *Virginia;* and by the usage and common law of *Pennsylvania, Delaware*, both the *Carolinas, Georgia*, and *Mississippi*, a scroll affixed or added by way of seal, is a sufficient seal on any private instrument of writing. Ohio, Rev. St. 1841, ch. 103; Mich. Rev. St. 1846, ch. 65, § 39; Ind. Rev. St. 1843, ch. 33, § 25; Ill. Rev. St. 1839, p. 536; Ken. Rev. St. 1834, Vol. I. p. 326; Flor. Thomps. Dig. p. 348; Ten. Rev. St. 1836, p. 648, Stat. 1801, ch. 6; Griffith's Law Register, Vol. III. p. 200, 222, 245, 433; Ibid. Vol. IV. p. 659, 833, 1034; U. States *v.* Coffin, Bee, 140; McDill *v.* McDill, 1 Dall. 63; Long *v.* Ramsey, 1 S. & R. 72; 4 Yerg. 528. [Comerford *v.* Cobb, 2 Florida, 418.] But in *Virginia, Georgia, Missouri*, and *Arkansas*, it is necessary that the scroll be expressly recognized as the seal, in the body of the instrument. Tate's Dig. p. 125, 160; Cromwell *v.* Tate, 7 Leigh, 301; Parks *v.* Hewlett, 9 Leigh, 511; Missouri, Rev. St. 1845, ch. 31, § 5; Cartmill *v.* Hopkins, 2 Mis. Rep. 79; Arkansas, Rev. St. 1837, ch. 30, § 3; Georgia, Rev. St. 1845, p. 408, (by Hotchkiss.)

[1] Where a board of public officers, as, for example, a board of assessors of taxes, are required to issue their warrant, one seal is sufficient for all. Bradford *v.* Randall, 5 Pick. 496; Mussey *v.* White, 3 Greenl. 290. Where there is but one seal to a contract, it is presumed to be the seal of the party whose signature is prefixed to it; but upon proof of its being made by the authority of the other parties to the contract, it will be held to be their seals, respectively. Stabler *v.* Cowman, 7 G. & J. 284; Van Alstyne *v.* Van Slyck, 3 Am. Law Journ. 514, N. S.; Flood *v.* Yandes, 1 Blackf. 102; [Tasker *v.* Bartlett, 5 Cush. 359.]

common seal to authenticate their proceedings, and to prove that what is done is the act of the corporate society. But Lord Holt says, that if a person, pretending to be mayor of a corporation, puts the corporation seal to a deed, yet it is not by that the deed of the corporation. (*a*)[1]

58. By the statute 29 Cha. II. c. 3, usually called the *Statute of Frauds*, it is enacted, "That all leases, estates, interests of freehold, or terms for years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery of seisin only, or by parol, and not *put in writing*, and *signed by the parties* so making or creating the same, or their *agents* thereunto lawfully *authorized by writing*, shall have the force and effect of leases and estates at will only; and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect." By the 2d section, leases for three years, whereupon the rent reserved
28* amounts to two *thirds of the full improved value, are excepted. And by the 3d section, it is enacted, "That no leases, estates, or interests, either of freehold or terms for years, or any uncertain interest, not being copyhold or customary interest of, in, to, or out of any messuages, &c., shall be assigned, granted, or surrendered, unless it be by deed or note *in writing*, *signed by the party* so assigning, granting, or surrendering the same, or their *agents* thereunto lawfully *authorized by writing* or by act and operation of law."[2]

(*a*) Anon. 12 Mod. 423.

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[1] The corporate seal must be affixed by the officer to whose custody it is confided, or by some other person specially authorized thereto; the order or direction of the corporators, or of their board of managers, being also requisite, in the particular case. But in the absence of evidence to the contrary, and upon due proof of the seal and signatures, it will be presumed that the seal was affixed by proper authority. Jackson *v.* Campbell, 5 Wend. 572, 575; Clarke *v.* The Imperial Gas Light Co. 4 B. & Ad. 315; Angell & Ames on Corporations, ch. 7, § 7. And see Bank of United States *v.* Daddridge, 12 Wheat. 68; Derby Canal Co. *v.* Wilmot, 9 East, 360. [The fact that a seal with a particular devise has been used by a corporation on three occasions, does not make that the exclusive seal of the company, the records showing that no particular seal has ever been adopted by a vote of the company. Stebbins *v.* Marrett, 10 Cush. 27. See Brinley *v.* Mann, 2 Cush. 338.]

[2] The Statute of Frauds has been either expressly adopted, or substantially reënacted in most of the United States. But in many of the States, the words of the *fourth* section, requiring that the authority of an agent to make a *contract* for an interest in lands must be in writing, are omitted; and in *those* States a verbal authority to make the

59. A person may appoint another to be his *attorney* to seal and sign a deed for him; but in such a case the deed must be *executed in the name of the principal.*[1] If that be done, it matters not in what form of words such execution is denoted, by the signature of the names. The power of attorney is now frequently annexed to the deed. (*a*)

60. [In a recent case it was decided, that a deed was well executed by an illiterate party, although signed by another at his request, and in his presence; and that it was not essential that the deed should have been read over to him, unless he had required it.] (*b*)

61. VII. The *seventh circumstance* necessary to a deed is, that it be *delivered* by the party himself, or by his certain attorney. For a deed only takes effect from its delivery; and if the date be a false or impossible one, the delivery ascertains the time from which it takes effect. (*c*) †[2]

(*a*) Frontin *v.* Small, 2 Stra. 705. Wilks *v.* Back, 2 East, 142. (Combe's case, 9 Rep. 75. Elwell *v.* Shaw, 16 Mass. 42. 1 Greenl. 339, S. C.)

(*b*) Rex *v.* Longnor, 1 Neville & Man. 576. (Ball *v.* Dunsterville, 4 T. R. 313. Story on Agency, § 51.)

(*c*) Goddard's case, 2 Rep. 4, b. 1 Salk. 463. 4 Car. & Payne, (N. P.) 94.

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contract is sufficient; but the contract itself must be proved by writing. But the general rule everywhere is, that an authority to execute a deed must be created by an instrument of as high a nature. See Story on Agency, § 50; 2 Kent, Comm. 614.

[1] In *Maine*, it is sufficient if the deed be executed "in the name of such agent, for the principal." Stat. 1823, ch. 220; Rev. Stat. 1840, ch. 91, § 14; [Carter *v.* Chaudron, 21 Ala. 72; Seaver *v.* Coburn, 10 Cush. 324; Mussey *v.* Scott, 7 Ib. 215; Gardner *v.* Gardner, 5 Ib. 483; Shanks *v.* Lancaster, 5 Gratt. 110; State *v.* Jennings, 5 Eng. (Ark.) 428.

An instrument purporting to be the deed of the New England Silk Company, a corporation legally established, by C. C., their treasurer, reciting that it is executed by him, in behalf of the company, and as their treasurer, duly authorized for that purpose, and signed and sealed by him with his own name and seal, followed by the words, "Treasurer of the New England Silk Company," is not the deed of the corporation. Brinley *v.* Mann, 2 Cush. 337. See McDaniels *v.* Flower Brook Man. Co. 22 Vt. 274.]

In *Massachusetts*, lands belonging to the State may well be conveyed by deed of authorized public agents, *in their own names* as such. Ward *v.* Bartholomew, 6 Pick. 409. So, in *New Hampshire*, Thompson *v.* Carr, 5 N. Hamp. 510. And in the latter State, the lands of towns may be conveyed in the like manner. Cofran *v.* Cockran, Ib. 458. And generally, where one person is authorized by law to sell and convey the land of another, as in the case of sales by a sheriff, collector of taxes, administrator, guardian, &c., without authority from the owner, the deed is regularly made in the name of the person authorized to make the sale, with a recital of his authority or official character. 5 N. Hamp. 515.

† [Evidence of delivery on a day different from the date written is admissible. 10 East, 427; 4 B. & Cres. 272.]

[2] See, accordingly, Jackson *v.* Bard, 4 Johns. 230; Fairbanks *v.* Metcalf, 8 Mass.

62. If another person seals the deed, yet if the party delivers it, he thereby adopts the sealing, and, (says Sir W. Blackstone,) by a parity of reason, the signing also, and makes them both his own. This doctrine does not appear reconcileable with the Statute of Frauds, which indirectly requires that all deeds should be signed by the party himself, or his agent lawfully authorized.[1] And the universal practice is, for the party to sign the deed, and to acknowledge the seal as his. (*a*)

63. The *deed of a corporation* does *not need any delivery;* for the apposition of their common seal gives perfection to it, without any further ceremony. But it has been held in a modern case, that though the affixing of the common seal to a deed of conveyance of a corporation, be sufficient to pass the estate without a formal delivery, if done with that intent; yet it had
29* *no such effect, if the order for affixing the seal was accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser. (*b*)

64. The usual mode of delivering a deed is to take it up and say, "I deliver this as my act and deed." But a deed may be delivered without words; so a deed may be delivered by words, without any act of delivery, as if the writing lies upon the table, and the feoffor says to the feoffee, "Go and take up the said writing, it is sufficient for you;" or "It will serve your turn;" or, "Take it as my deed," or the like words; it is a sufficient delivery. (*c*)[2]

(*a*) Perk. s. 130. 2 Bl. Com. 307. (*b*) Derby Canal *v.* Wilmot, 9 East, 360.
(*c*) 1 Inst. 36 a. 9 Rep. 136.

230, 239. The *date* is no part of the substance of the deed, and need not be inserted; and if inserted, it is not conclusive, but is only *primâ facie* evidence that the deed was executed on that day; and it may be disproved by the party denying it, the *onus probandi* being on him. Lee *v.* Massachusetts F. & M. Ins. Co. 6 Mass. 208, 219; Harrison *v.* Phillips Academy, 12 Mass. 456, 463; Jackson *v.* Schoonmaker, 2 Johns. 230; Roberts *v.* Webb, 1 Wend. 478; Gardiner *v.* Collins, 3 Mason, 398. [Woodman *v.* Smith, 37 Maine, (2 Heath,) 25; 33 Ib. 446; Harris *v.* Norton, 16 Barb. Sup. Ct. 264; Meech *v.* Fowler, 14 Ark. (1 Barb.) 29.]

[1] It is now generally held, that the party's own autograph is not essential, except in cases where it is *positively* required by statute that the instrument be signed with the party's *own proper hand.* In all other cases, it is sufficient if a deed be signed by an agent duly authorized. The adoption of the seal, affixed by another person, is in universal practice in the United States.

[2] Delivery, in the legal sense, consists in the transfer of the possession and dominion;

65. A lessee for years granted his term by deed, and sealed it in the presence of the grantee and several other persons. The

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and it is complete at the moment when the deed is in the *hands* or *power* of the grantee, with the *consent* of the grantor, and with his *intent* that should operate and enure as a muniment of title to the grantee. *In traditionibus chartarum, non quod dictum, sed quod factum est, inspicitur.* No formality, either of words or action, is prescribed by the law, as essential to a valid delivery; nor is it material how or when the instrument came into the hands or within the controlling power of the grantee. The grantee's presence is not necessary; it is sufficient that the deed goes out of the hands or control of the grantor, with his intent that it should go to those of the grantee, and that ultimately it does so. The possession of the instrument by the grantee may be simultaneous with this act of the grantor's mind and will, or it may have been long before; but it is this assent of the grantor which changes the character of that prior possession, and imparts vitality to the deed, as a solemn instrument of title. See 1 Greenl. on Evid. § 568 *a*, note (9); *Supra*, § 46, note; Porter *v.* Cole, 4 Greenl. 25, 26; Per Mellen, C. J. Woodman *v.* Coolbroth, 7 Greenl. 181, 184; Hatch *v.* Hatch, 9 Mass. 307, 310; Harrison *v.* Phillips Academy, 12 Mass. 456, 461; Goodrich *v.* Walker, 1 Johns. Cas. 250; 3 Preston on Abstracts, p. 64; Jones *v.* Jones, 6 Conn. R. 111; [Merrills *v.* Swift, 18 Conn. 257; Dayton *v.* Newman, 19 Penn. (7 Harris,) 194; Stewart *v.* Redditt, 3 Md. 67.] It matters not, though the grantor be dead at the time when the deed reaches the hands of the grantee; if it were previously left with a third person for his use, it is sufficient. Hatch *v.* Hatch, *supra;* Wheelwright *v.* Wheelwright, 2 Mass. 447; Chapel *v.* Bull, 17 Mass. 213, 220, 221; Foster *v.* Mansfield, 3 Met. 412; Souverbye *v.* Arden, 1 Johns. Ch. 240, 254, 255; Buffum *v.* Green, 5 N. Hamp. 71; Canning *v.* Pinkham, 1 N. Hamp. 353; Goodell *v.* Pierce, 2 Hill, 659; [McLean *v.* Nelson, 1 Jones's Law, (N. C.) 396.] It may be delivered after registration, as well as before. Parker *v.* Hill, 8 Met. 447. But registration is no delivery, unless by the assent of the grantee, the deed being left with the register for his use; which may be shown by his subsequent possession of it. Maynard *v.* Maynard, 10 Mass. 456; Harrison *v.* Phillips Academy, *supra;* Eames *v.* Phipps, 12 Johns. 418; Barns *v.* Hatch, 3 N. Hamp. 304. [In the absence of proof, it will be presumed that the deed was recorded with the assent and for the benefit of the grantee. Hammell *v.* Hammell, 19 Ohio, 17; Ellington *v.* Currie, 5 Ired. Eq. 21.]

If the deed is found in the hands of the grantee, having on its face the evidence of regular execution, a delivery will be presumed. Sicard *v.* Davis, 6 Pet. 124; Ward *v.* Lewis, 4 Pick. 518; Dunn *v.* Games, 1 McLean, 321; Collins *v.* Bankhead, 1 Strobh. 25; 7 Ired. 384; [Rushin *v.* Shields, 11 Geo. 636; Dawson *v.* Hall, 2 Mich. (Gibbs,) 390; McMorris *v.* Crawford, 15 Ala. 271; Southern Life Ins. & T. Co. *v.* Cole, 4 Florida, 359. But such presumption is not conclusive. Chandler *v.* Temple, 4 Cush. 285; Den *v.* Farlee, 1 New Jersey, 279; Ingraham *v.* Grigg, 13 S. & M. 22.] So, where an indenture was found among the papers of the grantor, after his death, and the witnesses testified that there was "no formal delivery;" yet it appearing that the instrument was read, signed, and acknowledged by *both* parties, it was held a sufficient execution and delivery. Serugham *v.* Wood, 15 Wend. 545. And see Hall *v.* Palmer, 8 Jur. 459; Hope *v.* Harman, 11 Jur. 1097. [A deed duly acknowledged and recorded, will be presumed to have been delivered to and accepted by the vendee. Warren *v.* Jacksonville, 15 Ill. 236; Stewart *v.* Redditt, 3 Md. 67. And this presumption can be rebutted only on proof of actual dissent. Mitchell *v.* Ryan, 3 Ohio, N. S. 377.] But in the absence of all other evidence, the custody of a deed by the grantor raises a presumption that it was

deed at the same time was read, but not delivered; nor did the grantee take it, but it was left behind in the same place. The

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never delivered. Hatch *v.* Haskins, 5 Shepl. 391. [But see *contra*, Mitchell *v.* Ryan, 8 Ohio, N. S. 377.] So, if the grantor bring an action for the consideration-money, this is evidence of a delivery of the deed. Porter *v.* Cole, *supra*. So, if the grantor put the deed in the post-office, addressed to the grantee; McKinney *v.* Rhoads, 5 Watts, 343; or deposit it in a public office, or with a stranger, for his use; it is a good delivery, if afterwards assented to by the grantee. Elsey *v.* Metcalf, 1 Denio, 323. So, where the grantor, having made a deed to A, in his absence, left it with B, saying, "Take this deed and keep it; if I never call for it, deliver it to A after my death; if I call for it, deliver it up to me;" and the grantor never having called for it, B delivered it, after his death, to A; it was held, that during the life of the grantor, B held the deed in trust for A, and that the title became complete in A, upon the decease of the grantor, the deed taking effect from the delivery to B. Belden *v.* Carter, 4 Day, 66; Ruggles *v.* Lawson, 13 Johns. 285, S. P. [So, where a grantor executed a deed and delivered it to a third person, with instructions to deliver it to the grantee on the grantor's death, and afterwards told the grantee that he had given the land to him, and directed him to take possession of it, which the grantee did, and afterwards remained in possession; this was held to be a good delivery or not, as the jury should find the intention of the grantor, upon depositing the deeds with the third person, to be, that it should be delivered at his decease, without reserving any control over it during his life, or otherwise. Parker *v.* Dustin, 2 Foster, (N. H.) 424.] So, where a father conveyed the homestead to his son, taking back an estate for life, but to avoid publicity, it was agreed that the deeds should not be recorded, but be lodged with a third person, to be kept until the grantor's death; which was done; this was held a good delivery. And though, upon this person's falling sick, the grantor received back the deed, and kept it until his death, among his papers, where it was afterwards found by the grantee, and retained by him; this was held not to affect the original delivery. Brown *v.* Brown, 1 Woodb. & Minot, 325. So, where a deed was left in the hands of the magistrate, before whom it was acknowledged, and was afterwards taken away by a brother of the grantee, for him, this was held competent evidence of a delivery, for the consideration of the jury. Arrison *v.* Harmstead, 2 Barr, 191. So, where the grantee was an infant of tender years, and the deed was left with her father, to be kept by him until she should arrive at sufficient discretion to take care of it; this was held a good delivery, to vest the estate absolutely in the grantee. Bryan *v.* Wash, 2 Gilm. 557. And see Doe *v.* Bennett, 8 C. & P. 124; Grugeon *v.* Gerrard, 4 Y. & C. 119.

Where one made a voluntary conveyance by way of provision for his natural daughter, but kept the deed in his own possession until his death, after which it was found in an envelope, with his will, by his executor, who delivered it to the grantee; this was held a good conveyance. Bunn *v.* Winthrop, 1 Johns. Ch. 329.

Where a debtor, privately, and without the creditor's knowledge, made a mortgage to him, for security of the debt, and retained the deed in his own custody twelve years, and then died insolvent; after which it was found in a chest, among his title-deeds; it was held, that the deed took effect from its execution, and was good against the other creditors. Exton *v.* Scott, 6 Sim. 31.

[The parties to an oral agreement for the sale of land, went together to an attorney, and had a deed thereof drawn, and the grantor signed it, and the grantee paid part of the consideration, and after both parties had looked at the deed and expressed themselves satisfied with the form of it, the grantor took it for the purpose of procuring

opinion of all the Judges was, that it was a good grant; for the parties came for that purpose, and performed all that was requi-

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from his wife a release of her dower; this was held not to be a delivery. Parker *v.* Parker, 1 Gray, 409. The grantee named in a deed of land, on receiving it from the grantor, gave him a written receipt, in which he acknowledged that he had received the deed, and promised to return it to him on demand, or to pay him in money the consideration named therein. *Held*, that the effect of the receipt was a question of law, and no demand for a return of the deed having been made, that the title to the estate had vested in the grantee. Howe *v.* Dewing, 2 Gray, 476.]

In Doe d. Garnons *v.* Knight, 5 B. & C. 671, a principal question was, whether, when a mortgage deed is duly signed and sealed, in the absence and without the knowledge of the creditor, the mortgagor saying, "I deliver this as my act and deed," but retaining the possession of the deed, that retention will obstruct the operation of the deed. And upon this point, Bayley, J., delivered the judgment of the Court as follows:— "Upon the first question, whether a deed will operate as a deed, though it is never parted with by the person who executed it, there are many authorities to show that it will. In Barlow *v.* Heneage, Prec. Cha. 211, George Heneage executed a deed purporting to convey an estate to trustees, that they might receive the profits, and put them out for the benefit of his two daughters, and gave bond to the same trustees conditioned to pay to them £1,000 at a certain day, in trust for his daughters; but he kept both deed and bond in his own power, and received the profits of the estate till he died; he noticed the bond by his will, and gave legacies to his daughters in full satisfaction of it, but the daughters elected to have the benefit of the deed and bond, and filed a bill in equity accordingly. It was urged, that the deed and bond being voluntary, and always kept by the father in his own hands, were to be taken as a cautionary provision only. Lord Keeper *Wright* said, *these were the father's deeds*, and he could not derogate from them; and the parties having agreed to set the maintenance of the daughters against the profits received by the father from the estate, he decreed upon the bond only, but that decree was, that interest should be paid upon the bond from the time when the condition made the money payable. In Clavering *v.* Clavering, Prec. Ch. 235; 2 Vern. 473; 1 Bro. Parl. Cas. 122, Sir James Clavering settled an estate upon one son in 1684, and in 1690 made a settlement of the same estate upon another son; he never delivered out, or published the settlement of 1684, but had it in his own power, and it was found after his death amongst his waste papers. (See 2 Vern. 474, 475.) A bill was filed under the settlement of 1690, for relief against the settlement of 1684; but Lord Keeper *Wright* held, the relief could not be granted; and observed, that though the settlement of 1684 was always in the custody or power of Sir James, that did not give him a power to resume the estate, and he dismissed the bill. In Lady *Hudson's* case, cited by Lord Keeper *Wright*, a father, being displeased with his son, executed a deed giving his wife £100 per annum, in augmentation of her jointure; he kept the settlement in his own power, and on being reconciled to his son, cancelled it. The wife found the deed after his death, and on a trial at law, the deed being proved to have been executed, was adjudged good, though cancelled, and the son having filed a bill in equity to be relieved against the deed, Lord *Somers* dismissed the bill. In Naldred *v.* Gilham, 1 P. Wms. 577, Mrs. Naldred, in 1707, executed a deed, by which she covenanted to stand seised to the use of herself, remainder to a child of three years old, a nephew, in fee. She kept this deed in her possession, and afterwards burnt it and made a new settlement; a copy of this deed having been surreptitiously obtained before the deed was burnt, a bill was filed to establish this copy, and to have the second

site for the perfecting of it, except an actual delivery; and it being left behind them, not countermanded, it should be said a delivery in law. (*a*)

66. A deed may be delivered to the party himself, or to any other person, by sufficient authority from him, or it *may be delivered to any stranger*, for and on behalf, and to the use of him to whom it is made, without authority. But if it be delivered to a stranger, without any such declaration, it seems that will not be a sufficient delivery. (*b*)

67. A deed *cannot be delivered twice*, for if the first delivery has any effect, the second will be void. Thus, if an *infant*, or a person under duress of imprisonment, delivers a deed, in which case the deed is not void, but only voidable, and after the infant,

(*a*) Shelton's case, Cro. Eliz. 7. (Miles *v.* Snowball, Owen, 44. Stanton *v.* Chamberlain, Ib. 95.)

(*b*) Shep. Touch. 57. Doe *v.* Knight, 5 Bar. & Cress. 671.

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settlement delivered up; and Sir *Joseph Jekyl* determined, with great clearness, for the plaintiff, and granted a perpetual injunction against the defendant, who claimed under the second settlement. It is true, Lord Chancellor *Parker* reversed this decree; but it was not on the ground that the deed was not well executed, or that it was binding, because Mrs. Naldred had kept it in her possession, but because it was plain that she intended to keep *the estate* in her own power; that she designed that there should have been *a power of revocation in the settlement*; that she thought while she had the deed in her custody, she had also the estate at her command; that, in fact, she had been imposed upon by the deed's being made an *absolute* conveyance, which was unreasonable, when it ought to have had a power of revocation, and because the plaintiff, if he had any title, had a title *at law*, and had therefore no business in a court of equity. Lord *Parker's* decision, therefore, is consistent with the position that a deed, *in general*, may be valid, though it remains under the control of the party who executes it, not at variance with it; and so it is clearly considered in Boughton *v.* Boughton, 1 Atkyns, 625. In that case, a voluntary deed had been made, without power of revocation, and the maker kept it by him. Lord *Hardwicke* considered it as valid, and acted upon it; and he distinguished it from Naldred *v.* Gilham, which he said was not applicable to every case, but depended upon particular circumstances; and he described Lord *Macclesfield* as having stated, as the ground of his decree, that he would not establish a copy surreptitiously obtained, but would leave the party to his remedy at law, and that the keeping the deed (of which there were two parts) implied an intention of revoking, or rather reserving a power to revoke. Upon these authorities, it seems to me, that where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show he did not intend it to operate immediately, that it is a valid and effectual deed, and that delivery to the party who is to take by it, or to any person for his use, is not essential. I do not rely on Doe *v.* Roberts, 2 Barn. & A. 367, because there the brother who executed the deed, though he retained the title-deeds, parted with the deed which he executed." See 8 D. & R. 348, S. C.

being of full age, or the person who was under duress being at large, do deliver the deed again, such second delivery is void. But where a *married woman* delivers a deed, and after her husband's death, delivers it again, the second delivery is good; because the first was void. (*a*)

68. The delivery of a deed may be either *absolute*, that is, to the grantee himself, or to some person for him; or else *conditional*, that is, to a *third person*, to keep it till something is done by the grantee; in which last case it is not delivered as a deed, but as an *escrow*, that is, a scroll or writing, which is not to *take effect till the condition is performed; when it *30 becomes a good deed. (*b*)[1]

69. [But where there was nothing to qualify the delivery, the mere circumstance of the executing party keeping the instrument in his own hands, will not make it an escrow, but it will operate immediately as a deed.] (*c*)

70. Where a deed is delivered as an escrow, it is of no force till the condition is performed;[2] and although the party to whom

(*a*) Perk. s. 154. Shep. Touch. 60. 1 Inst. 48 b. Stephens *v.* Ellot, Cro. Eliz. 484. *Antè*, s. 26.

(*b*) Johnson *v.* Baker, 4 Bar. & Ald. 440. Murray *v.* E. of Stair, 2 B. & Cress. 82. (Thoroughgood's case, 9 Rep. 136 b.)

(*c*) Doe *v.* Knight, 5 Bar. & Cress. 671.

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[1] See, accordingly, Gibson *v.* Partee, 2 Dev. & Bat. 530; Simonton's estate, 4 Watts, 180; Wheelwright *v.* Wheelwright, 2 Mass. 447; Shep. Law of Com. Assur. p. 176.

Where lands are sold on execution, by the sheriff, and the deed is left by him in the hands of the creditor's attorney, to be delivered to the purchaser on payment of the purchase-money, it is an *escrow;* and, until payment, the estate remains in the execution debtor. Jackson *v.* Catlin, 2 Johns. 248; Robins *v.* Bellas, 2 Watts, 359.

[2] An exception to this rule is admitted, where the grantor dies before the condition is performed; and in other cases, wherever the operation of the conveyance would be utterly defeated, without the fault of the grantee, unless the first delivery should be permitted to have effect. Jackson *v.* Rowland, 6 Wend. 666, 669; *infra*, § 72. On the other hand, the performance of the condition will not alone give effect to the deed, unless there has been a previous delivery of it to a third person, with the assent of the respective parties, with intent that it should have such effect. Carr *v.* Hoxie, 5 Mason, 60. And see Evans *v.* Gibbs, 6 Humph. 405; Perk. Conv. §§ 9, 10, 11, 140, 141; Shep. Law of Com. Assur. p. 177.

[An instrument cannot be an escrow if delivered to the party himself; the delivery must be to a third person. Hagood *v.* Harley, 8 Rich. (S. C.) 325; Jordan *v.* Pollock, 14 Geo. 145; Dawson *v.* Hall, 2 Mich. (Gibbs,) 390; Lawton *v.* Sager, 11 Barb. Sup. Ct. 349; Johnson *v.* Branch, 11 Humph. 521. See also Worrall *v.* Munn, 1 Selden, N. Y. 229.

There is no such identity between a corporation and its officers as to prevent a deliv-

it is made, should get it into his possession before the condition is performed, yet he can derive no benefit from it. [Neither can the grantor, in the mean time, before the condition is performed, avail himself of the title-deeds as a pledge for money.] (*a*)

71. [Thus, in the modern case of Hooper *v.* Ramsbottom, Wells having purchased a leasehold estate of John W. Harvey, and part of the purchase-money only being paid, the conveyance was delivered as an escrow, (to take effect on payment by Wells, of the residue of the purchase-money,) and was left in the hands of Daniel Whittle Harvey, who was the solicitor employed, and brother of the vendor. Daniel Whittle Harvey subsequently permitted John to take all the title-deeds, antecedent to the conveyance, to Wells, out of the box in which they were placed, and to deposit them with the defendants, his bankers, as a security for their balance. The pawnees, though ignorant of the sale to Wells, were not allowed to detain the deeds as against Wells, and his assignees in bankruptcy tendering the residue of the purchase-money.] (*b*)

72. If either of the parties die before the condition is performed, and afterwards the condition is performed, the deed becomes good, and will take effect from its first delivery. For there was *traditio inchoata* in the lifetime of the parties; *et postea consummatio existens*, by the performance of the condition. (*c*)

73. Where a person who delivers a deed as an escrow, has not power or ability in law at that time to make the deed, and before the second delivery he attains such power, there the deed is void. But where the person at the first delivery has power and ability in law to contract, but cannot perfect it till an impediment be removed; there, if the impediment be removed, before the second delivery, the deed is good. (*d*)

74. If an unmarried woman delivers a deed as an
31 * escrow, and * before the second delivery, she marries or

(*a*) Shep. Touch. 52. (*b*) 6 Taunt. 12. (*c*) 3 Rep. 35 b. (*d*) Idem.

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ery of a deed, in which the corporation is the grantee, to such officers as an escrow. Southern Life Ins. and T. Co. *v.* Cole, 4 Florida, 359.

Where the grantor delivered a deed to his agent as an escrow, and the agent delivered it to the grantee, without the performance of the condition, it was held that this did not avoid the deed as against a *bonâ fide* purchaser from the grantee, without notice of the condition. Blight *v.* Schenck, 10 Barr, 285.]

dies; in such a case, for necessity, *ut res magis valeat quam pereat*, by fiction of law, this shall be a good deed *ab initio.* (*a*)

75. In the delivery of a deed as an *escrow*, *two things* must be attended to. *First*, that the *form of the words used* in the delivery, be apt and proper: The proper words are these:—"I deliver this to you as an escrow, to deliver to the party as my deed, upon condition that he deliver to you £20 for me;" or upon any other condition then mentioned. This mode of delivery ought to be taken notice of in the attestation. (*b*)

76. *Secondly*, that the *delivery* of the deed as an escrow, be *to a stranger;* for if a person delivers a deed to the party himself, to whom it is made, as an escrow, upon certain conditions, the delivery is absolute, and the deed will take effect immediately: nor will the party to whom it is delivered, be bound to perform the conditions. (*c*)

77. VIII. The *eighth and last circumstance* necessary to a deed is the *attestation* of it by witnesses; which is not a thing essential to the deed itself, but only constitutes the evidence of its authenticity.[1]

(*a*) 8 Rep. 85 b. (*b*) Shep. Touch. 58.
(*c*) Idem. 1 Inst. 36 a. 9 Rep. 137 a. (Fairbanks *v.* Metcalf, 8 Mass. 238.)

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[1] Though the common-law doctrine, that an attesting witness is not necessary to the validity of a deed, is generally recognized in the United States, in all cases where it has not been altered by statute, yet a deed of conveyance is seldom if ever seen in any State without at least one attesting witness, and ordinarily with two. No prudent conveyancer would suffer a deed to be executed upon his professional responsibility, without the attestation of two witnesses; for in very many States, it is only by the evidence of the attesting witnesses, or one of them, that a deed, not acknowledged by the grantor, can be so proved as to be admitted to registration or read in evidence. Without this, it might only be available between the parties, either by way of estoppel at law against the grantor and his heirs, or as the foundation of an injunction against them, in equity, or as evidence of a contract to convey, in a bill in chancery for specific performance; or, in equity, to affect the conscience of a subsequent purchaser. [See Dole *v.* Thurlow, 12 Met. 165.]

But two attesting witnesses are essential to the complete validity of every deed of conveyance, by the statutes of *New Hampshire*, Rev. St. 1842, ch. 130, § 3, 4; *Vermont*, Rev. St. 1839, ch. 60, § 4; *Connecticut*, Rev. St. 1849, tit. 29, ch. 1; *Georgia*, Rev. St. 1845, ch. 15, § 6, p. 407; *Florida*, Thomp. Dig. p. 177; *Ohio*, Rev. St. 1841, ch. 37, § 1; *Michigan*, Rev. St. 1846, ch. 65, § 8; and *Arkansas*, Rev. St. 1837, ch. 81, § 12.

Either one attesting witness, or the acknowledgment of the grantor, is requisite in *New York*. Rev. St. Vol. II. p. 22. And two witnesses, or the like acknowledgment, are deemed requisite in the States of *Indiana*, *Tennessee*, and *Kentucky*. See Griffith's Law Reg. Vol. III. p. 455. Ibid. Vol. IV. p. 751, 752, 1107.

Powers of attorney to convey, must be executed with the same formalities as deeds

78. In the reign of Queen Elizabeth, deeds were often without witnesses. In 13 Cha. II. a counterpart of an old lease without witnesses was allowed as good evidence; and Mr. Justice Windham said, he had seen several deeds made in Queen Elizabeth's time without witness. (*a*)

79. It is *not necessary* that the witness should *actually see* the party execute the deed; for if he be in an adjoining room, and the party, after executing the deed, brings it to him, tells him he has done so, and desires him to subscribe his name as a witness, that is sufficient. (*b*)

80. [In a recent case it was decided, that where the attesting witness had *become blind*, proof of his handwriting was sufficient, without calling him.] (*c*) [1]

(*a*) Garrett *v.* Lister, 1 Lev. 25. (*b*) Parke *v.* Mears, 2 Bos. & Pul. 217.
(*c*) Pedler *v.* Paige, 1 Mood. & Rob. (N. P.) 258. See, also, 1 Ld. Ray. 734.

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of conveyance, by the laws of *New Hampshire*, Rev. St. 1842, ch. 130, § 6; *Vermont*, Rev. St. 1839, ch. 60, § 24; *Connecticut*, Rev. St. 1849, tit. 29, ch. 1; and as it seems in *Missouri*, Rev. St. 1845, ch. 32, § 22–28, 43. So in *Georgia*, 3 Griffith's Law Reg. p. 433. And in *Massachusetts*, Stat. 1849, ch. 205.

A *subscribing witness* is one who was present when the instrument was executed, and who, at that time, at the request or with the assent of the party, subscribed his name to it, as a witness of the execution. If his name is signed not by himself, but by the party, it is no attestation. Neither is it such, if, though present at the execution, he did not subscribe the instrument at that time, but did it afterwards and without request, or by the fraudulent procurement of the other party. But it is not necessary that he should have actually seen the party sign, nor have been present at the very moment of signing; for if he is called in immediately afterwards, and the party acknowledges his signature to the witness, and requests him to attest it, this will be deemed part of the transaction, and therefore a sufficient attestation. See 1 Greenl. Evid. § 569 *a*, and authorities there cited.

[1] In the case of Pedler *v.* Paige, the evidence was admitted by Mr. Justice *Park*, apparently against his own opinion, but upon the authority of Wood *v.* Drury, 1 Ld. Raym. 734. But both these decisions were disregarded by Lord Abinger, and the party held bound to produce the attesting witness, though blind, on the ground that he might still be able to give important evidence respecting the transaction. Cronk *v.* Frith, 9 C. & P. 197; 2 M. & Rob. 262, S. C.; Rees *v.* Williams, 1 De Gex & Smale, 314. On the production of the attesting witnesses, see 1 Greenl. on Evid. § 569–574.

NOTE.—In the United States, a *ninth circumstance* is made necessary, by statutes, to the complete validity of a deed of conveyance, namely, its *acknowledgment*, by the grantor, before a justice of the peace, or some other magistrate, or person in authority, designated in the statutes. This acknowledgment, it is believed, is universally required in the conveyance of estates of freehold, to render them valid against all persons. But there are diversities in the laws of the several States, in regard to the further effect and operation of the acknowledgment; which diversities may be arranged in three classes.

1. In some States, this act is regarded merely as *evidence to the Register* that it is the deed of the party, and therefore *entitled to registration* as such. This is understood to be the view taken of it in all the New England States. See Marshall *v.* Fisk, 6 Mass. 24; Ridge *v.* Tyler, 4 Mass. 541; Catlin *v.* Ware, 9 Mass. 218; Wark *v.* Willard, 13 N. Hamp. 389; [Brown *v.* Manter, 2 Foster, (N. H.), 468;] Galusha *v.* Sinclear, 3 Verm. 394. Hence, an acknowledgment by one only of several grantors, is deemed sufficient. Catlin *v.* Ware, *supra;* Shaw *v.* Poor, 6 Pick. 86. [It is immaterial when an acknowledgment of an instrument is made; if it is done when offered in evidence, it may be read. Pierce *v.* Brown, 24 Vt. (1 Deane) 165.]

2. In other States, the acknowledgment of the grantor is received as a *solemn admission* of the fact of the execution of the deed, so as to *dispense with the formality of attesting witnesses* to the execution of the deed, which is otherwise required, in order *to render it a valid conveyance.* Such is the law in *Indiana, Tennessee,* and *Kentucky.* See *supra,* § 77, note. Story *v.* Smith, 3 McLean, 362; [Webb et al. *v.* Den, 17 How. U. S. 576.]

3. In other States, it is received, *primâ facie,* as a *substitute for any other proof of the formal execution of the deed,* and entitles it to be *read in evidence* to the Court and Jury, without calling the attesting witnesses. The cases on the form and effect of acknowledgments, which are exceedingly numerous, may be found collected and arranged in 3 Phill. on Evid. by Cowen & Hill, p. 1243–1261, note 874. [See Lynch *v.* Livingston, 2 Selden, N. Y. 422; Johns *v.* Reardon, 3 Md. Ch. Decis. 57; Carter *v.* Chandron, 21 Ala. 72, &c.]

A *tenth circumstance* is also made essential in the United States, to the complete validity of a deed of conveyance, so as to entitle it to be read in evidence against all persons, namely, *registration;* which will be treated, both as to its necessity and effect, in the notes to ch. xxix. *post.*

[A deed not attested by a witness nor acknowledged, is ineffectual against a purchaser or incumbrancer, though good as against the grantor. Voorhees *v.* Presbyterian Church, 17 Barb. Sup. Ct. 103; Dole *v.* Thurlow, 12 Met. 157; Call *v.* Buttrick, 4 Cush. 345.]

CHAP. III.

CIRCUMSTANCES NECESSARY TO AN AGREEMENT WITHIN THE STATUTE OF FRAUDS.

SECT. 1. *Construction of the 4th Section.*
3. *What amounts to an Agreement.*
9. *What is a sufficient Signing.*
15. *An Agent authorized to sign by Parol.*
16. *A Letter is an Agreement.*
21. *Letters previous to Marriage.*
27. *Parol Agreements good in Equity.*
28. *Where there is Fraud.*
SECT. 32. *Where there is a Part-Performance.*
33. *Delivery of Possession.*
36. *Payment of Purchase-Money.*
38. *Introductory Acts not a Part-Performance.*
44. *Where Parol Agreements are confessed.*
46. *A written Agreement discharged by Parol.*
48. *No Averment is admissible.*

SECTION 1. By the 4th section of the *Statute of Frauds*, (29 Car. II. c. 3,) it is enacted, "That no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

2. A great number of cases have arisen upon the construction of this section of the statute, respecting marriage agreements and contracts for the sale of lands; which we shall endeavor to class under the following heads: I. What *amounts to an agreement* or contract. II. What is a *sufficient signing* of an agreement or contract. III. In what cases a *written note* or letter will be considered as a sufficient agreement. IV. In what cases a *parol agreement* is out of this act, and supported in equity.

33* *3. With respect to the *agreement in writing* required

by the statute, no precise form is necessary. It must, however, *contain all the terms of the contract*, distinctly set forth, and be made with the privity and consent of all the contracting parties.[1]

4. *Any written evidence of an agreement* will operate as a contract within the statute. Thus an instrument originally intended as a deed, but which became void by subsequent events, was held to amount to an agreement, upon which a specific performance was decreed. (*a*)

5. A mere *entry by a steward in his contract book* with the tenants, is however *not* evidence that there is an agreement for a lease, between the lord and one of his tenants; unless supported by proof. (*b*)

6. A *particular in writing* for the sale of an estate, will *not* amount to an agreement, though it be proved to have been shown to the purchaser; unless it be also proved that it was shown to him on his purchase, and that he purchased by it. (*c*)

7. Where an estate is *sold by public auction*, and the *auctioneer* puts down the name of the purchaser in writing, this does not amount to an agreement within the statute, as to real property; though sufficient for chattels.[2] In a late case, Sir W. Grant

(*a*) Cannel *v.* Buckle, 2 P. Wms. 243. (*b*) Charlewood *v.* D. of Bedford, 1 Atk. 497.
(*c*) Cass *v.* Waterhouse, Prec. in Cha. 29.

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[1] It is not necessary that the agreement be contained in a single document; it is sufficient if it can be plainly made out, in all its terms, from any writings of the party, or even from his correspondence. But it must all be collected from the writings; verbal testimony not being admissible to supply any defects or omissions in the written evidence. And while the controversy is between the original parties, all their contemporaneous writings, relating to the same subject-matter, are admissible in evidence. See 1 Greenl. on Evid. §§ 268, 275, 277, 282, 283, and cases there cited. Freeport *v.* Bartol, 3 Greenl. 340; Bailey *v.* Ogden, 3 Johns. 399.

[An agreement respecting lands within the fourth section of the Statute of Frauds of Maryland, must itself be in writing; but a trust within the seventh section need not be constituted, but be merely proved, by some writing. Albert *v.* Ross, 5 Md. 66. Upon an agreement to exchange lands, a deed executed by one of the parties conveying his land to the other, is a sufficient memorandum in writing to bind the grantor. Parvill *v.* McKinley, 9 Gratt. (Va.) 1. A parol agreement was made between an executrix and a purchaser, by which he was to hold the estate, and to reconvey it to her, on her paying the purchase-money, and interest thereon until paid, and many credits and charges appeared on his books in regard to this estate and in accordance with such an agreement, they were held to be sufficient written evidence to take the agreement out of the Statute of Frauds. Tufts *v.* Tufts, 3 W. & Minot, 456.]

[2] The distinction formerly taken between the sale of lands and of goods, in regard

said:—"The proposition that the auctioneer's receipt may be a note or memorandum of an agreement within the statute, is not denied; but for that purpose the receipt must contain in itself, or by reference to something else must show, what the agreement is. In this instance, one very material particular, the price to be paid for this estate, does not appear upon the receipt; for the amount of the deposit, unless we know the proportion it bears to the price, does not show what the price is; and the receipt contains no reference to the conditions of sale, to entitle us to look at them for the terms." (*a*)

8. A *bidding for an estate, before a Master in Chancery,* amounts to an agreement within the statute. Upon the same principle it is held, that the Court of Chancery will carry into execution, against the representatives, a purchase by a bidder before the Master, without the bidder's subscribing, after confirmation of the Master's report, that he was the best bidder; the judgment of the Court taking it out of the statute. So, if the authority of an agent, who subscribed for a bidder
34* before the * Master, cannot be proved, yet if the Master's

(*a*) Blagden *v.* Bradbear, 12 Ves. 466.

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to the authority of an auctioneer, is now repudiated; and the auctioneer is held to be the agent of both parties; and his entry of the name of the purchaser on his book or memorandum, containing all the particulars of the contract, is a sufficient signing, within the Statute of Frauds. See Cleaves *v.* Foss, 4 Greenl. 1; Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Proctor, 4 Taunt. 209; Kemeys *v.* Proctor, 3 Ves. & Beames, 57; Coles *v.* Trecothick, 9 Ves. 249; Fairbrother *v.* Prattent, 1 Daniel, 64; McComb *v.* Wright, 4 Johns. Ch. 659; Burke *v.* Haley, 2 Gilm. 614. And his authority need not be in writing. Coles *v.* Trecothick, *supra;* Alna *v.* Plummer, 4 Greenl. 258. And see 1 Greenl. on Evid. § 269; Story on Agency, § 27; Chitty on Contr. 243, 319, 4th Am. ed. by Perkins; Baptist Ch. *v.* Bigelow, 16 Wend. 28.

Where the auctioneer made a memorandum of the sale in pencil on a loose slip of paper, at the moment of sale, and shortly afterwards entered it in his sales-book; the latter was regarded as the true entry. Episcopal Ch. of Macon *v.* Wiley, 2 Hill, Ch. 590; Anderson *v.* Chick, 1 Bailey, Eq. R. 118; [Gill *v.* Bicknell, 2 Cush. 359; Pinckney *v.* Hagadorn, 1 Duer, (N. Y.) 89; Doty *v.* Wilder, 15 Ill. 407; Hunt *v.* Gregg, 8 Blackf. 105. It seems that the following writing, signed by the highest bidder, at a sale by auction, and addressed by him to the vendor, who added thereto the words, "agreed to the within," and signed the same, is sufficient to take the sale out of the Statute of Frauds. "I hereby relinquish all my right and title in the estate on Ruggles Street, purchased at auction on Saturday afternoon, to J. L., provided he pays you 375 dollars, (the amount of the highest bid);—and you will make your deed to said L., if he elects to take the estate, instead of making the same to me." Howe *v.* Dewing, 2 Gray, 476.]

report can be confirmed, the Court will carry it into execution; unless there be some fraud. (*a*)

9. It was formerly held that an agreement must have been sealed, as well as signed; otherwise it could only be considered as a parol agreement; and that the writing was only evidence of it. But this has been altered, and *signing* being the only circumstance required by the words of the statute, was deemed *sufficient.* (*b*)

10. In the case of Hatton *v.* Gray, 36 Cha. II.; and also in the case of Coleman *v.* Upcot, which will be stated hereafter; it was held that an agreement, *signed by the party to be charged with the same,* was sufficient; and that it was *not* necessary for an agreement to be signed by *both* parties. This doctrine has been assented to in modern cases. (*c*) [1]

11. It is said by Lord Cowper, that he knew of no case where an agreement, though all written with the party's own hand, had been held sufficient, unless it had been likewise signed by him;[2] that the party's not signing it was evidence that he did not think it complete; that he had left it to an after consideration, and might make alterations or additions in it; therefore, unless it was signed by him, or something equivalent done, to

(*a*) Att.-Gen. *v.* Day, 1 Ves. 218.

(*b*) Wheeler *v.* Newton, Prec. in Cha. 16. [See Underwood *v.* Campbell, 14 N. H. 398.]

(*c*) 1 Cha. Ca. 164. 5 Vin. Ab. 527, pl. 17. 2 Bro. C. C. 564. 7 Ves. 275. 9 Ves. 351.

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[1] See 2 Kent, Comm. 510, and cases there cited; 1 Greenl. on Evid. § 268; Getchell *v.* Jewett, 4 Greenl. 350; Barstow *v.* Gray, 3 Greenl. 409; Shirley *v.* Shirley, 7 Blackf. 452; McCrea *v.* Purmort, 16 Wend. 460; [Vielie *v.* Osgood, 8 Barb. Sup. Ct. 130.]

[2] The general doctrine, as broadly laid down in this case, was denied by Lord Hardwicke; though he admitted it to be true, as applied by Lord Cowper to the particular case before him; which was merely a sketch of an agreement, taken down by counsel as minutes, from which articles were afterwards to be drawn. See 3 Atk. 503, 504, note.

Where J. R. B., having houses, but no other property, in Cable Street, agreed to sell them to J. B., and in pursuance thereof, wrote, with his own hand, the following memorandum:—"July 26, 1839. J. B. agrees with J. R. B. to take the property in Cable Street, for the net sum of £248, 10s;" this was held a sufficient signing by the vendor. Bleakley *v.* Smith, 11 Sim. 150.

An agreement in writing to refer a matter in dispute to arbitrators, is sufficient to bind the parties to a specific performance of their award. Brown *v.* Burkenmeyer, 9 Dana, 161.

The signature of a contract, for the sale of lands owned by a mercantile firm, made by one partner in the partnership name, in the presence and with the assent of the other partner, is a sufficient signing by both. M'Whorter *v.* M'Mahan, 1 Clark, 400.

show that he looked upon it as completed, he thought such writing by the party himself was not sufficient to bind him within the statute. (*a*)

12. Although *a purchaser makes alterations* in the draft of an intended conveyance, and returns it to the attorney of the vendor, yet this is *not* a sufficient signing within the statute. (*b*)

13. It was resolved by Lord Hardwicke, that where a person *subscribed a deed, as a witness*, to which she was not a party, but knew the contents of it, which constituted a complete agreement, such signing was sufficient.[1] For the meaning of the statute was to reduce contracts to a certainty, in order to avoid perjury on the one hand, and fraud on the other. Therefore, both in the Court of Chancery, and in the Courts of Common Law, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted on. (*c*)

35* *14. In a modern case, it was held by Lord Eldon, that a vendor of an estate was bound by the *signature of the agent's clerk*, thus, "Witness E. S. for Mr. Smith, agent for the seller," upon evidence of assent. He expressed his approbation of the doctrine laid down by Lord Hardwicke, in Welford *v.* Beazeley, that where either the party himself, or a person duly authorized by him, ascertains the agreement, by a signature in the form of addition, that signature of that instrument ascertains the agreement sufficiently within the statute; though not a signing as an agreement, yet sufficient to identify the agreement; the instrument itself containing the terms; and therefore sufficient within the statute. But he expressed a doubt whether the insertion of the name in the body of the agreement was a sufficient signature within the statute. (*d*)

(*a*) Bawdes *v.* Amhurst, Prec. in Cha. 402. (*b*) Hawkins *v.* Holmes, 1 P. Wms. 770.
(*c*) Welford *v.* Beazeley, 3 Atk. 503. 1 Wils. 118.
(*d*) Coles *v.* Trecothick, 9 Ves. 234. *Ante*, s. 13. Stokes *v.* Moore, 1 Cox, R. 219.

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[1] This was the case of a marriage settlement, upon which the mother agreed to give a portion of £1000 with her daughter; and this agreement was recited in the articles, which the mother subscribed as a witness, well knowing and approving their contents. See the case as reported in 1 Wils. 118.

15. It is observable that in the 4th section of the statute it is *not required*, as in the first section, that the *agent* should be *authorized by writing* to sign for the principal. In the case of Walter *v.* Hendon, before Lord Macclesfield, it was held that an authority to treat or buy, may be good without writing; though by the statute the contract itself must be in writing. And in a modern case, Lord Eldon said: "It is clearly settled now that an agent need not be authorized in writing." (*a*)

16. It has been held that *a letter* will amount to a *sufficient agreement* within the statute, where it is signed by the party to be charged with the same. But the letter must sufficiently *specify all the terms* upon which the agreement is made, *or refer to some written agreement* in which all the circumstances are specified, and not require any external circumstance to explain it; for otherwise, that which the statute was made to prevent, namely, fraud and perjury, would be let in. It must likewise appear that the other party accepted the terms, and acted in consequence of them. (*b*) [1]

17. A bill was brought for a specific execution of an agreement, for the purchase of nine houses. The owner had agreed to sell them to the plaintiff for a certain sum; the plaintiff paid a guinea in part; and sent a note to his solicitor to this effect: "Mr. L., pray deliver my writings to the bearer; I having agreed to dispose of them." The defendant insisted on the Statute of Frauds; and the question was, whether this note would take it out of the statute. It was decreed that it would *not; *36 for it ought to be such an agreement as specified the terms thereof, which this did not, though signed by the party; for it did not mention the sum that was paid, nor the number of houses to be disposed of, whether all or some, or how many, nor to whom they were to be sold; neither did the letter mention whether they were to be disposed of by way of sale, or by assignment of lease. So all the danger of perjury, which the

(*a*) 5 Vin. Ab. 524, pl. 45. 9 Ves. 250. 10 Ves. 311.
(*b*) (Adams *v.* McMillan, 7 Port. 73.)

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[1] Where the defendant offered to sell his farm for £1000, and the plaintiff offered £950, which was refused; and two days after the refusal, the plaintiff, by letter, agreed to give the £1000, to which the defendant did not reply, nor assent; this was held to be no contract, within the statute. Hyde *v.* Wrench, 3 Beav. 334.

statute was to provide against, would be let in to ascertain the agreement. (*a*)

18. The plaintiff had agreed for the purchase of an estate from the defendant, but the agreement was not reduced into writing. However, in confidence, plaintiff had given orders for conveyances to be drawn and engrossed, and went several times to view the estate. Some time after, the defendant sent a letter to the plaintiff, to inform him that, at the time he contracted for the sale of the estate, the value of the timber was not known to him; and that the plaintiff should not have the estate, unless he would give him a larger price. A bill was brought to carry this agreement into execution; to which the Statute of Frauds was pleaded. (*b*)

Lord Hardwicke allowed the plea, and said that the letter could not be sufficient evidence of the agreement, the terms of it not being therein mentioned.

19. In a modern case, where the defendant *acknowledged by letter* an *agreement* for the sale of an estate, which had been *reduced into writing, but not signed;* it was held to be a sufficient agreement within the Statute of Frauds. And Lord Thurlow said: "If the letter contains the terms of the agreement, or if it refers to another letter, which contains the terms, that is sufficient. For I am of opinion, that if a letter refers so clearly to an agreement, as to show what was meant by the parties, where the existence of the paper is proved by parol, that will take the case out of the statute." (*c*)

20. A letter of this kind must have the proper stamps put on it, in order to make it evidence; [and it would seem that the Court of Chancery will, on motion, order such a letter to be delivered to the purchaser for the purpose of being stamped.] (*d*)

21. There have been several cases in which a *father* or *near relation, promises, by letter, to give a portion* to his daughter
37* or * cousin in marriage; and such letter has been held to amount to a contract within the statute.

22. A wrote a letter, signifying his assent to the marriage of his daughter with J. S., and that he would give her £1,500.

(*a*) Seagood *v.* Meale, Prec. in Cha. 560. (*b*) Clerk *v.* Wright, 1 Atk. 12.
(*c*) Tawney *v.* Crowther, 3 Bro. C. C. 161, 318.
(*d*) Ford *v.* Compton, 2 Bro. C. C. 32. Fowle *v.* Freeman, 8th Mar. 1804, MS. Sug. V. & P. 75, 6th ed.

Afterwards, by another letter, upon a further treaty, he went back from the proposals in his former letter; but some time after, he declared he would agree to what was proposed in his first letter. This was held a sufficient promise in writing within the statute; the last declaration having set the terms in the first letter up again. (*a*)

23. On a treaty of marriage, the father of the lady agreed, by letter to a third person, to give a certain portion to his daughter; this was held to be binding, and out of the statute. (*b*)

24. A, in a letter written by his direction, promised to give £1500 portion with his daughter. A was afterwards privy to the marriage, and seemed to approve of it. Decreed, that A should pay £1500 as his daughter's portion. The decree was affirmed in the House of Lords. (*c*)

25. The *principle of these cases* is, that a man who marries a lady upon the encouragement of a letter, shall recover what is promised in such letter; because the agreement is executed on his part, as far as it can be, and can never be undone after. But where a man marries without any knowledge of such a letter, a court of equity will not decree the performance of any promise contained in it. (*d*)

26. The plaintiff courted one of the daughters of Sir T. Haslewood, and treated with the father about the marriage, who consented, and wrote a letter signed with his name, to his daughter, intimating that he had met the plaintiff, had agreed to give him £3000 as a portion, to which the plaintiff, he said, seemed to assent, and that they were to meet the next day, when the affair was to be fully concluded. They met accordingly, and agreed to the marriage. The father gave money to the daughter to buy wedding clothes. The wedding day was appointed, but the father died prior to it, having made his will long before, and given his daughter £2000. The daughter did not show this letter to her intended husband, whom she afterwards married. The £2000 was paid to the husband; who did not make any settlement on his wife. (*e*)

Lord Macclesfield said,—" This being no more than a * communication, had no ingredient of equity. The hus- * 38

(*a*) Bird *v.* Blosse, 2 Vent. 361. Skin. 142.
(*b*) Moore *v.* Hart, 1 Vern. 110.
(*c*) Wankford *v.* Fotherley, 2 Vern. 322. 2 Freem. 201. Cookes *v.* Mascall, 2 Vern. 200.
(*d*) Prec. in Cha. 561.
(*e*) Ayliffe *v.* Tracy, 2 P. Wms. 65.

band made no settlement; he did not know of the letter, it being written to the daughter; he therefore could not be supposed to have married in consequence of it;" and dismissed the bill.

27. Notwithstanding the Statute of Frauds, *parol agreements* have been *frequently supported* and enforced in equity, in the following cases: 1. Where the *reducing them into writing* has been *prevented by fraud.* 2. Where there has been a *part performance* of them.

28. Where the reducing an agreement into writing, or the signing such agreement when reduced into writing, has been *prevented by fraud*, the Court of Chancery will support it; because it is one of the principal objects of a court of equity to relieve against fraud.[1]

29. A father, on a treaty for the marriage of his daughter with the plaintiff, signed a writing comprising the terms of the agreement, and afterwards designing to elude it, directed his daughter to get the plaintiff to deliver it up, and then to marry him, which she did. The plaintiff was relieved. (*a*)

30. It is laid down by Lord Macclesfield, that where on a treaty for a marriage, or on any other treaty, the parties come to an agreement, but the same is never reduced into writing, nor any proposal made for that purpose, so that they rely wholly on their parol agreement; unless this be executed in part, neither party can compel the other to a specific performance; for that the Statute of Frauds is directly in their way. But if there be any agreement for reducing the same into writing, and it is prevented by the fraud and practice of the other party, the Court of Chancery will in such a case give relief: as where instructions were given, and preparations made for the drawing of a marriage settlement, but before the completing of it, the woman was induced, by the assurance and promises of the man to perform it, to marry him. (*b*)

(*a*) Mullet *v.* Halfpenny, Prec. in Cha. 404. (*b*) Maxwell *v.* Montacute, Prec. in Cha. 526.

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[1] Where it appeared that the defendant, upon a conveyance of lands to him in fee, upon a private trust, promised to reduce the agreement to writing, and keep it as a private memorandum, to be found among his papers in case of his death, in order to secure the rights of the *cestui que trust*, but afterwards refused so to do; this was held sufficient to take the case out of the statute. Jenkins *v.* Eldridge, 3 Story, R. 181.

31. It was also said by the Court, in the same case, that where there was fraud, equity would relieve, even against the words of the statute; as if *one agreement* in writing should be *proposed and drawn*, and *another fraudulently* and secretly *brought in and executed*, in lieu of the former. (*a*)

32. It is said in the Treatise of Equity, b. 1, c. 3, s. 8, that if a *parol agreement be carried into execution by one of the* **parties*, as by delivering possession, and such execution *39 be accepted by the other, he that accepts it must perform his part; for where there is a performance, the evidence of the bargain does not lie merely upon the words, but upon the fact performed; and it is unconscionable that the party who has received the advantage, should be admitted to say that such a contract was never made.[1]

Lord Cowper, in confirmation of this doctrine, has said, that wherever a parol agreement is *begun to be put in execution*, and intended to be continued, there, though there be no writing, yet

(*a*) 1 P. Wms. 620.

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[1] "The distinct ground, upon which Courts of Equity interfere in cases of this sort, is, that otherwise one party would be enabled to practise a fraud upon the other; and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances; and the objects of the statute are promoted, instead of being obstructed, by such a jurisdiction for discovery and relief. And where one party has executed his part of the agreement, in the confidence that the other party would do the same, it is obvious, that if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice." 2 Story, Eq. Jur. § 759. And see Newland on Contr. p. 181, 182; Clinan *v.* Cooke, 1 Sch. & Lefr. 40, 41; 4 Kent, Comm. 451, (4th ed.); Maryland Savings Institution *v.* Schroeder, 8 G. & J. 94; Carlisle *v.* Fleming, 1 Harris, 421; Anderson *v.* Chick, 1 Bailey, Eq. R. 118; Keats *v.* Rector, 1 Ark. 391; Thornton *v.* Henry, 2 Scam. 216; Annan *v.* Merritt, 13 Conn. R. 479; Massey *v.* McIlwain, 2 Hill, Ch. 426.

But the doctrine of part performance is not to be extended to new cases, not coming clearly within the equitable principles of the former decisions. German *v.* Machin, 6 Paige, 288. Forster *v.* Hale, 3 Ves. 712, 713; Lindsay *v.* Lynch, 2 Sch. & Lefr. 5; 2 Story, Eq. Jur. § 765, 766.

[Stoddert *v.* Tuck, 4 Md. Ch. Decis. 475; Sailors *v.* Gambril, 1 Carter, (Ind.) 88; Box *v.* Stanford, 13 S. & M. 93. The part performance must be such as would operate as a fraud on the vendee in case the contract were not enforced. Tohler *v.* Folsom, 1 Cal. 207. The possession, in pursuance of the parol contract, must be exclusive. Blakeslee *v.* Blakeslee, 22 Penn. (10 Harris,) 237. A part performance of a parol agreement for the exchange of lands, as when the parties exchange possession, is held, in North Carolina, not to take the case out of the Statute of Frauds. Barnes *v.* Teague, 1 Jones, Eq. 277.]

the Court of Chancery will enforce its execution, notwithstanding the Statute of Frauds. (*a*)

33. With respect to *the acts* which have been held to be a *part performance* of any agreement, the *general rule* is, that they must be such as could be done with no other view or design than to perform the agreement. Thus the *delivery of possession*, and *laying out money*, has always been held to be a part performance of a parol agreement, so as to take it out of the Statute of Frauds. (*b*)

34. The plaintiff having a house in London, agreed with the defendant for a lease of a piece of ground adjoining, for as long time as he had in the house; thereupon the plaintiff entered upon the ground, built a wall, and made a vault, for the convenience of his house; when he had so done, the defendant refused to make him a lease; whereupon the plaintiff preferred his bill to have an execution of the agreement. The defendant pleaded the Statute of Frauds; the agreement not being in writing. The plea was overruled by the Lord Keeper; and the Master of the Rolls decreed the defendant to perform the agreement, saying, that the statute was not made to encourage frauds and cheats; for the plaintiff having laid out his money in pursuance of the agreement, and taken possession of the land, the defendant ought to execute a lease. (*c*)

35. There was a parol agreement for a lease for twenty-one years, upon which the lessee had entered and enjoyed for six years; then the lessor brought a bill to oblige the lessee to execute a counterpart, for the residue of the term; to which he pleaded the Statute of Frauds; which was overruled, the agreement being in part performed. (*d*)

36. It is laid down by Lord Hardwicke, in the case of Lacon *v.* Mertins, that *payment of money* had always been held
40 * to be * a part performance of an agreement. But in Seagood *v.* Meale, where a guinea only was paid, out of £150, that was said not to be a part performance; it being only meant as earnest. (*e*)

37. In a modern case, where five guineas were paid, upon a

(*a*) Gilb. Rep. 2. (*b*) (2 Story on Eq. Jur. § 759–763.)
(*c*) Floyd *v.* Buckland, 2 Freem. 268. 1 Vern. 363. 2 Vern. 455.
(*d*) Aylesford's case, 2 Stra. 783. Wills *v.* Stradling, 3 Ves. 378.
(*e*) 3 Atk. 1. *Ante*, s. 17.

parol agreement, for the purchase of a lot of land, of which the price was £105, Lord Rosslyn said, that though payment of a *substantial part of the purchase-money* would take an agreement, as to land, out of the Statute of Frauds, on the ground of part performance; yet that payment of a small sum would not do so, and allowed the plea of the statute. (*a*) [1]

(*a*) Main *v.* Melbourn, 4 Ves. 720.

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[1] The question, whether payment of a substantial part or the whole of the consideration-money constitutes a part performance, sufficient to entitle the party to a specific execution of the agreement, has long been mooted, and the opinions of jurists have been greatly divided upon the point. In favor of the affirmative, the general rule is urged, that where a party has performed a valuable part of his agreement, and is in no default, and *cannot be restored in statu quo*, he is entitled to a decree of specific execution; and it is contended that if the vendor, who has received the price, *is unable to refund it*, a decree or judgment for the money is but the shadow of a remedy, and the nonpayment becomes a fraud on the purchaser, as clearly and truly as though he had taken possession and expended his money in lasting improvements. See Main *v.* Melbourn, 4 Ves. 720, and the cases there cited. See also Hays *v.* Hall, 4 Port. 374; Lacon *v.* Mertins, 3 Atk. 4, cited as law by the Court in Wetmore *v.* White, 2 Caines, Cas. 109; Townsend *v.* Houston, 1 Harrington, Rep. 532; Buckmaster *v.* Harrop, 7 Ves. 341.

But reasonable as this may seem, the weight of modern authority is certainly the other way; upon the grounds briefly stated by Mr. Justice Story in the following terms:—"It seems formerly to have been thought, that a deposit or security, or payment of the purchase-money, or of a part of it, or at least of a considerable part of it, was such a part performance as took the case out of the statute. But that doctrine was open to much controversy, and is now finally overthrown. Indeed, the distinction taken, in some of the cases, between the payment of a small part, and the payment of a considerable part of the purchase-money, seems quite too refined and subtle; for, independently of the difficulty of saying what shall be deemed a small, and what a considerable part of the purchase-money, each must, upon principle, stand upon the same reason, namely, that it is a part performance in both cases, or not in either. One ground, why part payment is not now deemed a part performance, sufficient to take a case out of the statute, is, that the money can be recovered back again at law; and, therefore, the case admits of full and direct compensation. This ground is not, however, quite satisfactory; for the party may become insolvent, before the judgment at law can be executed. Another ground has been stated, which certainly has more strength in it. It is, that the statute has said, in another clause, (that which respects contracts for goods,) that part payment, by way of earnest, shall operate as a part performance. And hence the Courts have considered this clause as excluding agreements for lands; because it is to be inferred, that, when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant, that it should not bind in the case of lands.

"But a more general ground, and that which ought to be the governing rule in cases of this sort, is, that nothing is to be considered as a part performance, which does not put the party into a situation, which is a fraud upon him, unless the agreement is fully

38. It has, however, been always held, that *acts merely introductory* to the completion of an agreement, such as giving instructions for a settlement, or going to view an estate contracted for by parol only, are *not* such part performance as to take it out of the statute.

39. In consequence of a treaty of marriage, the lady's father and the intended husband went to Mr. Minshul's chambers, who was to draw the settlement, as counsel for the lady; and Mr. M. *took down minutes* thereof in writing. The next day the lady's father died, and the day after the marriage took place. The husband and wife brought a bill for a specific execution of the agreement; but it was declared not to be such as the Court of Chancery would execute. And Lord Cowper said he had always been tender in laying open that just and wise provision the parliament had made. That the act had not only directed such agreements to be in writing, but went further, and directed them to be signed by the parties themselves, or some other person lawfully authorized by them for that purpose. (*a*)

40. Mr. Bagenal entered into a *parol agreement* with Whaley for the sale of an estate in the county of Carlow, delivered to him a rent-roll of the lands, which was dated and altered with Bagenal's own hand, and showed by the title of it that an agreement

(*a*) Bawdes *v.* Amhurst, 1 Ab. Eq. 21. Prec. in Cha. 402. (See *supra*, § 11, and note there.)

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performed. Thus, for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser, if there be no agreeement valid in law or equity. Now, for the purpose of defending himself against a charge as a trespasser, and a suit to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his protection; and if admissible for such a purpose, there seems no reason why it should not be admissible throughout. A case still more cogent might be put, where a vendee, upon a parol agreement for a sale of land, should proceed to build a house on the land, in the confidence of a due completion of the contract. In such a case, there would be a manifest fraud upon the party, in permitting the vendor to escape from a due and strict fulfilment of such agreement. Such a case is certainly distinguishable from that of part payment of the purchase-money; for the latter may be repaid, and the parties are then just where they were before, especially if the money is repaid with interest. A man who has parted with his money, is not in the situation of a man against whom an action may be brought, and who may otherwise suffer an irreparable injury." See 2 Story on Eq. Jur. § 760, 761, and the cases there cited; 1 Sugden on Vendors, 202–209, (10th ed.); Newland on Contracts, 187–191; 4 Kent, Comm. 451; Clinan *v.* Cooke, 1 Sch. & Lefr. 40, 42. [See also Parker *v.* Parker, 1 Gray, 409; Malins *v.* Brown, 4 Comst. 403.]

had been made between him and Whaley, for the sale of the estate at twenty-one years' purchase; an abstract of the title was also delivered to Whaley, together with the deeds. Bagenal wrote letters to several of his creditors, informing them that he had contracted with Whaley for the sale of his estate at twenty-one years' purchase, and sent the tenants to treat with Whaley for the renewal of their leases. Upon an inquisition held by virtue of a writ of *elegit*, sued out by one of Bagenal's creditors, *his agent produced a witness to prove that the lands *41 were sold by Bagenal to Whaley, in consequence of which the jury found a verdict that Bagenal was not seised of the lands. Bagenal afterwards refused to perform his agreement. Whaley filed a bill in Chancery in Ireland for a specific performance. Bagenal pleaded the Statute of Frauds, in bar of the discovery and relief; which was allowed. (*a*)

On an appeal to the House of Lords of England, the order was affirmed.

*41. In a modern case Lord Thurlow said,—"If there *42 be *general instructions* for an agreement, consisting of material circumstances, to be afterwards extended more at large, and to be put into the form of an instrument, with a view to be signed by the parties, and no fraud, but the party *takes advantage of the locus penitentiæ*, he shall not be compellable to perform such an agreement as that, when he insists upon the Statute of Frauds." (*b*)

42. Lord Alvanley, when Master of the Rolls, has said,—"I admit my opinion is, that the Court has gone rather too far in permitting part performance, and other circumstances, to take cases out of the statute; then, unavoidably perhaps, after establishing the agreement, to admit parol evidence of the contents of that agreement. As to part performance, it might be evidence of some agreement; but of what, must be left to parol evidence. I always thought the Court went a great way. They ought not to have held it evidence of an unknown agreement, but to have had the money laid out, repaid. It ought to have been a compensation. Those cases are very dissatisfactory. It was very right to say, the statute should not be an engine of fraud; therefore compensation would have been very proper. They have,

(*a*) Whaley *v.* Bagenal, 6 Bro. Parl. Ca. 45. (*b*) 2 Bro. C. C. 559.

however, gone further, saying it was clear there was some
43* agreement, and letting them prove it; but how does *the circumstance of a man's having laid out a great deal of money, prove that he is to have a lease for ninety-nine years? The common sense of the thing would have been to have let them bring an action for the money. I should pause upon such a case." (*a*)

43. This doctrine has been confirmed by Sir W. Grant, who has said,—"I am aware there are cases, that acts done by the defendant can make a ground for compelling him to perform the agreement; but it is difficult to bring those cases to bear; for to what do those acts amount, when there is no prejudice to the plaintiff? Only to proof of the existence of an agreement. The existence of the agreement may be put out of all doubt by the acts; but the objection upon the statute, that the agreement is not in writing, remains where it did. The Court does not profess to execute a parol agreement merely because it is satisfactorily proved. In Whaley *v.* Bagenal, (*b*) which, being before the House of Lords, must supersede the authority of every other case, various acts had been done which implied that the party had sold the estate, and did not consider himself any longer the owner of it. The question still remained, whether that agreement should be carried into execution; and it was held, that the acts done by the defendant did not entitle the plaintiff to have it specifically performed." (*c*)

44. It has been always held, that where a bill was brought in Chancery for the execution of a parol agreement, which was in no part executed, and the defendant *by his answer confessed the agreement, without insisting on the Statute of Frauds;* the Court would decree an execution of the agreement. Because, when the defendant confessed it, there was no danger of perjury, the only thing the statute intended to prevent. (*d*)

45. It is also now settled, that upon a bill for a specific performance of a parol agreement, the defendant, though admitting the agreement by his answer, may, *if he insists on the statute,* have the benefit of it at the hearing; and Sir W. Grant has de-

(*a*) 8 Ves. 712. (*b*) *Ante*, s. 40. (*c*) 7 Ves. 347.
(*d*) Prec. in Cha. 208–374. 3 Atk. 3. (Att.-Gen. *v.* Sitwell, 1 Y. & C. 583. 2 Story, Eq. Jur. § 755.)

cided, that where the defendant insists on the Statute of Frauds, admissions by the answer are immaterial. If, however, the defendant admits the agreement in his answer, and *submits to perform it*, he will not be allowed to take advantage of the statute, in his answer to an amended bill. (*a*)

*46. Although *a written agreement* cannot be altered *44
or contradicted, in particular parts, by parol evidence; yet
it is laid down by Lord Keeper North, that an agreement may, notwithstanding the Statute of Frauds, *be discharged by parol.* (*b*)[1]

47. An agreement was entered into in writing for a lease of a house at £32 a year: part of the agreement was, that the owner should put the house in repair. It was afterwards discovered not to be worth while, barely to repair the house, but better to pull it down; therefore, without alteration of the written agreement, the house was pulled down by consent of the tenant, and an agreement was made by parol to add £8 a year to the £32. The tenant brought his bill for a specific performance of the written agreement, and the defendant set up the parol agreement, which Sir J. Strange, M. R., allowed. This doctrine has been assented to in modern times. (*c*)

48. In consequence of this statute, *no averment*, founded on parol evidence, *is admissible* of what passed before, or at the time when a written agreement was entered into, which tends to contradict or vary it.[2]

(*a*) Cooth *v.* Jackson, 6 Ves. 17. Blagden *v.* Bradbear, 12 Ves. 466. Spurrier *v.* Fitzgerald, 6 Ves. 548. (2 Story, Eq. Jur. § 756, 757.) (*b*) 2 Ab. Eq. 32.

(*c*) Legal *v.* Miller, 2 Vez. 290. 3 Ves. 40 n. 9 Ves. 250. Sugd. Vend. 131, 6th ed.

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[1] See 1 Greenl. on Evid. § 302, and cases there cited. See also Chiles *v.* Jones, 3 B. Munr. 51; Hawkins *v.* Lowry, 6 J. J. Marsh. 245; Baker *v.* Briggs, 8 Pick. 122; Mairs *v.* Sparks, 2 South. 513. So, a release or waiver of damages may be proved by parol. Clement *v.* Durgin, 5 Greenl. 9; Cottrill *v.* Myrick, 3 Fairf. 222.

[2] Gooch *v.* Conner, 8 Mis. R. 391. But this rule does not apply to cases of fraudulent misrepresentations. Ibid. Nor to conversations at the time of the contract, showing what meaning was attached to a particular term used in the contract. Gray *v.* Harper, 1 Story, R. 574. And see Swick *v.* Sears, 1 Hill, 17; Koch *v.* Howell, 6 Watts & Serg. 350; Weston *v.* Foster, 7 Met. 297; Osborne *v.* Varney, Ibid. 301; 1 Greenl. on Evid. § 275–277.

CHAP IV.

FEOFFMENT, GIFT, AND GRANT.

SECT. 1. *Different Kinds of Deeds.*
3. *Feoffment.*
5. *Livery of Seisin.*
8. *Livery in Deed.*
11. *Livery in Law.*
14. *May be by Attorney.*
16. *Sometimes presumed.*
18. *And supplied in Equity.*
20. *A Feoffment cannot commence* In Futuro.
23. *Who may convey by Feoffment.*
27. *What Kind of Property.*
SECT. 29. *Operation of a Feoffment.*
30. *Transfers the Freehold by Disseisin.*
31. *Discontinues an Estate Tail.*
32. *And creates a Forfeiture.*
33. *Gift.*
34. *Grant.*
38. *What may be created or conveyed by Grant.*
41. *Operation of a Grant.*
43. *Does not create a Discontinuance.*
44. *Or a Forfeiture.*

SECTION 1. Having discussed the general nature of deeds, it will now be necessary to consider the *several kinds of deeds* which are known to the law, together with their various incidents and qualities.

All deeds by which lands may be conveyed or charged, derive their effect either from the common law, or the Statute of Uses.[1]

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[1] In most of the United States, conveyances derive their effect, chiefly if not entirely, from the statutes of each particular State, regulating that subject. In many States, it is expressly enacted, that conveyances by deed, executed in the manner directed by the statute, shall be effectual to pass the estate of the grantor to the grantee, without any other act or ceremony whatever. Such is the law in *Massachusetts*, *Maine*, *New Hampshire*, *Vermont*, *Michigan*, *North Carolina*, *Georgia*, *Florida*, *New York*, *Indiana*, *Pennsylvania*, *Rhode Island*, and *Illinois*. Such also seems to be the law of *Delaware*.

In other States, it is enacted, that by deeds of bargain and sale, or lease and release, or covenant to stand seised, the possession, as well as the interest and estate of the bargainor, is transferred to the bargainee, as fully as by feoffment with livery of seisin. Such, in effect, are the statutes of *Kentucky*, *Virginia*, *Mississippi*, and *Arkansas*. See *ante*, tit. 12, ch. 1, § 4, note (1.) 4 Kent, Comm. 489.

It is also expressly provided, in *Maine*, *Michigan*, *Missouri*, and *Arkansas*, that the fact that the grantor is disseised at the time of the conveyance, shall be no bar to the

Of those which derive their effect from the common law, some may be called original or primary, namely, those by means whereof the estate is originally created; others are derivative or secondary, whereby an estate already created, is enlarged, restrained, transferred, or extinguished. There is a third class, which are used, not to convey, but to charge or incumber lands, and to discharge them again.

2. The *original* conveyances, deriving their effect from the common law, are, I. *Feoffment.* II. *Gift.* III. *Grant.* IV. *Lease.* V. *Exchange.* VI. *Partition.* The *derivative* conveyances, are, I. *Release.* II. *Confirmation.* III. *Surrender.* IV. *Assignment.* V. *Defeasance.* The deeds which operate *46 to *charge* or *discharge* lands, are, I. *Bond.* II. *Recognizance.* III. *Defeasance* on a bond.

3. A *feoffment*,[1] *feoffamentum*, is derived from the word *feoffare*, or *infeudare*, to give one a fief or feud; therefore it was properly called *donatio feudi*, the gift of a feud; but by custom it came afterwards to signify a gift of a free inheritance, or *liberum tenementum*, to a man and his heirs; respect being had rather to the perpetuity of the estate granted than to the tenure. (*a*)

4. The *proper and usual words* of a feoffment are, "*give*, *grant*, and *enfeoff*;" but *any other words of equal import* will be sufficient. Thus, where a bargain and sale was made to J. S. and his heirs, by deed indented, but not enrolled, and the bargainor made livery of the land, *secundum formam chartæ;* this was held a good feoffment. (*b*)

5. The mere signing and sealing a deed of feoffment was in no instance sufficient to transfer an estate of freehold, unless the possession was formally delivered by the feoffor to the feoffee. This was called *livery of seisin*, without which a deed of feoff-

(*a*) 1 Inst. 9 a. Mad. Form. Diss. s. 4.
(*b*) Denton's case, 2 And. 68. Benicombe *v.* Parker, 1 Leon. 25.

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operation of the deed. But in *New York*, the enactment is expressly to the contrary, and that the deed in such case shall be void. In other States, it is understood that the rule of the common law prevails, by which no estate passes by the deed of one actually disseised at the time; though it may operate by way of estoppel against the grantor and his heirs.

[1] Feoffments are abolished by statute, in New York. Rev St. Vol. II. p. 22, § 136.

ment only passed an estate at will; and the law continues the same in this respect. (*a*) [1]

6. *Livery of seisin* is exactly similar to the investiture of the feudal law; and was adopted here for the same *reason*, namely, that the *proprietor* of each piece of land should be *publicly known;* in order that the lord might always be certain on whom he was to call for the military services due for the estate; and that strangers might know against whom they were to bring their *præcipes.* (*b*)

7. Where the lands comprised in a feoffment are *all situated in the same county*, though in different vills, or hundreds, livery of seisin of those within one vill, *in the name of the whole*, will be

(*a*) 1 Inst. 48 a. (*b*) Dissert. c. 1, s. 35. 5 Rep. 34 b. Plowd. 302.

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[1] The nature of seisin has been most accurately described by Mr. Chief Justice Richardson, in the following terms :—" Seisin signifies, in the common law, possession. Co. Litt. 153 a. It is not, however, every possession which constitutes a seisin. It is only a possession, coupled with an actual claim of a freehold, or possession under such circumstances that the law presumes such a claim, which amounts to a seisin.

" He who has a lawful title to a fee or a freehold in land, is presumed to be in possession, and to have seisin, until the contrary appears. 4 Mass. R. 417, 418; 4 Wheat. 213, 223; 3 N. Hamp. R. 23.

" He who enters under a deed which purports to convey to him a fee or a freehold, or under any other color of title to such an estate, is presumed to enter, claiming according to his deed or other title, and his possession is seisin. 8 Cranch, 250; 5 Peters, 354; 3 N. Hamp. R. 51.

" And he who enters without color of title, and turns the owner out of possession, or forcibly holds him out, has a possession which amounts to a seisin. 3 N. Hamp. R. 51.

" He, who having a lease for years, is in possession of land, is presumed to be in possession, claiming according to his lease, until the contrary appears; and in general his possession is not considered as a seisin in himself. By the feudal law, the possession was always considered to be in him who had the freehold. He who was in possession for a term of years was considered as holding the land in the name of the tenant of the freehold. Co. Litt. 330 b, note 285.

" And even at this day, the possession of a tenant for years is considered as the possession of the tenant of the freehold, which constitutes a seisin in the latter. For if any one enters and turns the tenant for years out of possession, and forcibly holds him out, the tenant of the freehold is disseised.

" He who enters upon land, without any color of title, is always presumed to enter the tenant of the freehold, and his possession is always considered as the possession of the freeholder, until the contrary appears. 3 N. Hamp. R. 52.

" Seisin, then, may be defined to be the possession of land under a claim, either express or implied by law, of an estate amounting at least to a freehold." Towle *v.* Ayer, 8 N. Hamp. R. 58, 59. And see *ante*, tit. 1, § 34, note (3.) Thomas *v.* Hatch, 3 Sumn. 170; Smith *v.* Smith, 11 N. Hamp. R. 460.

good: but where lands lie in different counties, there must be a livery in each county; unless they are all comprised within the same manor; for there, livery of seisin in one of the counties will be sufficient. (*a*)

8. Livery of seisin is of *two kinds;* livery *in deed* and livery *in law.* Livery *in deed* is the actual delivery of the possession; where the feoffor comes himself upon the land, and taking the ring of the door of the principal mansion, or a turf, or a twig, delivers the same to the feoffee in the name of seisin; or it *may be *by words only*,[1] without the delivery of any *47 thing; as, if the feoffor be upon the land, or at the door of the house, and says to the feoffee, "I am content that you should enjoy this land according to the deed;" this is a good livery to pass the freehold: for the charter of feoffment makes the limitation of the estate; and then the words spoken by the feoffor on the land, are a sufficient indication to the persons present, of the change of possession. (*b*)

9. If a man merely *delivers a deed of feoffment on the land*, this will *not* amount to livery of seisin;[2] for it has another operation, to take effect as a deed; but if the feoffor delivers the deed upon the land, *in the name of seisin* of all the lands contained in the deed, this will be a good livery. (*c*)

10. As livery of seisin is the *delivery of the actual possession*, it follows that no person can give livery in deed, who has not himself, at the moment, the actual possession; therefore where

(*a*) Lit. s. 61, 418. Perk. ss. 226, 227. Bro. Ab. Grant, 32. (*b*) 1 Inst. 48 a.
(*c*) 9 Rep. 136. Vaughan *v.* Holdes, Cro. Jac. 80.

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[1] In making livery, no particular form of words is necessary; nor is it requisite that the word "*seisin*" be used; it is sufficient if the intention appear, to give possession of the premises in order to confirm and complete the title of the grantee, under the deed of feoffment. Doe *v.* Stock, Gow, R. 178; McLardy *v.* Flaherty, 3 Kerr, N. B. Rep. 455. The extent of an execution on land gives a seisin to the creditor, if it be land of the judgment debtor. Langdon *v.* Potter, 3 Mass. 215; Gore *v.* Brazier, Ibid. 523. But not if the lands are not those of the debtor, or not liable to the extent. Larcom *v.* Cheever, 16 Pick. 260; Bott *v.* Burnell, 9 Mass. 96.

[2] In the United States, the delivery of the deed, duly executed, will generally pass the seisin, where there is no adverse possession. See *supra*, § 1, note (1); *ante*, tit. 1, § 23, note (2), and § 34, note (3): Green *v.* Liter, 8 Cranch, 229; Wall *v.* Nelson, 3 Litt. 395. The State, being always seised, by virtue of its prerogative, of all lands to which it has title, its patent will convey the seisin of them to the patentee, notwithstanding the intrusion of a stranger. Hill *v.* Dyer, 3 Greenl. 441; Stokes *v.* Dawes, 4 Mason, 268; Green *v.* Watkins, 7 Wheat. 28. Unless the State has, by statute, permitted itself to be barred by lapse of time. See *ante*, tit. 31, ch. 2, note *ad calc.*

a person makes a feoffment of lands which are let on lease, he must obtain the assent of the lessee to the livery: and in cases of this kind, the practice formerly was, for the lessee to give up the possession for a moment to the feoffor, in order to enable him to give livery. (*a*)

11. *Livery in law* [or within view] is, where the feoffor is not actually on the land, or in the house, but being *within sight of it*, says to the feoffee, "I give you yonder house or land, go and enter into the same, and take possession of it accordingly." This sort of livery appears to have been made at first only at the courts baron, which were then held in the open air, on some spot in the manor, from whence a general view of the whole might be taken; and the *pares curiæ* could distinguish the land that was to be transferred. (*b*)

12. Livery in law *does not*, however, *transfer the freehold, till an actual entry* is made by the feoffee; because the possession is not delivered to him, but only a license or power given him by the feoffor to take possession. Therefore, if either the feoffor or feoffee die before an entry is made, under the livery thus given, it becomes void. (*c*)

13. If, in a case of this kind, the feoffee *dare not enter* on the land, without endangering his life, *he must claim* the land as near as he may safely venture to go; which will be sufficient to vest the possession in him, and to render the livery in view
48* *perfect and complete; for no one is obliged to expose his life, for the security of his property. (*d*)

14. Livery of seisin *may be given and received by attorney.* But *the authority* to give or receive livery *must be by deed*, in order that it may appear to the Court that the attorney had a power to represent the parties; and that the power was properly pursued. [But livery *within view*, *cannot* be made by attorney.] (*e*)

15. Livery of seisin *under a power of attorney must be made during the lifetime of the feoffor;*[1] for the power ceases with his

(*a*) Bettisworth's case, 2 Rep. 31. 20 Vin. Abr. 127, (F.) Moor, 11 pl. 41, 42.
(*b*) 1 Inst. 48 b.
(*c*) Parsons *v.* Perns, 1 Mod. 91. 1 Inst. 48 b.
(*d*) 1 Inst. 48 b.
(*e*) Lit. s. 66. Roe *v.* Rashleigh, 8 Barn. & Ald. 156. Shep. Touch. 217.

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[1] But the power need not be executed on the day of delivery of the deed; it may well be done afterwards. Roe *v.* Rashleigh, 3 B. & Ald. 156.

death; and *also during the life of the feoffee;* for if he dies, livery cannot be made to his heir, because then he would take by purchase, where the word "*heirs*" was a word of limitation. (*a*)

16. A memorandum that livery of seisin was given, is usually indorsed on all ancient feoffments. But courts of law and equity will *presume livery* of seisin to have been given, though not indorsed on the deed, where the possession has gone according to the feoffment, for a length of time. (*b*)

17. [But livery of seisin, according to an indorsement thereof on the deed of feoffment, will *not be presumed* within any period *less than twenty years.*] (*c*)

18. A *court of equity will supply the want of livery of seisin,* where a feoffment appears to have been made for a good, or a valuable consideration.

19. Thus, where the deed, under which the plaintiff claimed, appeared to have been fairly executed by the plaintiff's father, that there was no defect therein, save only from livery of seisin, and that it was made on such valuable consideration as marriage, it was decreed that the defendant should execute livery of seisin to the same deed. (*d*)

20. A *feoffment cannot be made to commence in futuro;*[1] so that, if a person makes a feoffment to commence on a future day, and delivers seisin immediately, the livery is void, and nothing more than an estate at will passes to the feoffee. This doctrine is founded on two grounds; first, because the object and design of livery of seisin would fail if it were allowed to pass an estate which was to commence *in futuro;* as it would in that case be no evidence of the change of possession. Secondly,
*the freehold would be in abeyance, which, we have seen, *49
is never allowed when it can be avoided. (*e*)

21. An estate may, however, be created by feoffment to commence *in futuro, by way of remainder.* As, where a lease is

(*a*) 1 Inst. 52 a. (*b*) Plowd. 149. Jackson *v.* Jackson, Fitzg. 146. 1 Vern. 196.
(*c*) Doe *v.* Marq. of Cleveland, 9 Bar. & Cress. 864. (Rees *v.* Lloyd, Wightw. 123. Doe *v.* Davies, 2 M. & W. 503.)
(*d*) Thompson *v.* Attfield, 1 Vern. 40. Burgh *v.* Francis, tit. 15, c. 5, § 20.
(*e*) Tit. 1, § 35–37.

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[1] In *Virginia*, it is enacted to the contrary. Tate's Dig. p. 175; *post*, Vol. VI. p. [377,] n.; *ante*, Vol. I. p. [53,] 55; 1 Hoffm. Course, 191.

made to A for three years, remainder to B in fee. Here, livery of seisin must be given to A, by which an estate of freehold is immediately created, and vested in B during the continuance of A's estate for years. (*a*)

22. A deed of feoffment was made to three persons, *habendum* to two of them for their lives, remainder to the third for his life. Livery of seisin was made to all three, *secundum formam chartæ.* The Court was of opinion that the livery was good to two in possession, and to the third in remainder. (*b*)

23. *All those who are capable of conveying their lands by deed*, may make a feoffment; and some persons may bind themselves to a certain degree by a feoffment, though not by any other kind of deed. Thus, if *an idiot* or *a lunatic* makes a feoffment, and gives livery of seisin in person, it will bind him, so that he cannot by any process of law avoid it. The reason is, because the livery being formerly made before the *pares curiæ*, their solemn attestation of the change of possession could not be defeated by the person himself; it being presumed that they were competent judges of the feoffor's ability to make the feoffment. (*c*)

24. If an infant makes a feoffment, and gives livery of seisin in person, it is not void, but only voidable; for there must be some act of notoriety to restore the possession to him, equal to that by which it was transferred. But if an infant, idiot, or lunatic executes a feoffment, and a power of attorney to give livery of seisin, and livery is given accordingly, the whole is void, because the power of attorney is void. (*d*) [1]

25. It has been stated that a feoffment by an infant, an idiot, or a lunatic, will bar the lord of his escheat. For though it may be avoided by the heir of the infant, the idiot, or the lunatic, because he is privy in blood, yet it cannot be avoided by a person who is only privy in estate. (*e*)

26. *A corporation*, whether sole or aggregate, may convey, by feoffment, and appoint an attorney to give livery. And it being

(*a*) Lit. s. 60. (*b*) Norris *v.* Trist, 2 Mod. 78. Freeman *v.* West, 2 Wils. R. 166.
(*c*) Lit. s. 406. (*d*) *Idem.* Perk. s. 12. 4 Rep. 125 a. 2 Prest. Con. 376.
(*e*) Tit. 30, s. 18. 4 Rep. 124 a.

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[1] But *quære* whether, at this day, the power of attorney of an infant is void, or only voidable. And see *supra*, ch. 2, § 12, note; and *infra*, ch. 9, § 11, note.

now agreed that a corporation cannot be seised to an use, a *feoffment is frequently used by corporations to create *50 a freehold estate.[1]

27. A *feoffment can only be made of corporeal hereditaments*, of which the actual possession may be delivered to the feoffee; and therefore corporeal hereditaments are frequently spoken of in law by the name of things that lie in livery.

28. *One joint tenant cannot enfeoff his companion*, for each of them, being seised *per mie et per tout*, is in possession of the whole, so that one cannot make livery to the other. But *one coparcener or tenant in common may* make a feoffment of his share of the land to his companion; because for most purposes, these have distinct freeholds. (*a*)

29. *The operation of a feoffment* is in some instances stronger than that of any other conveyance. Thus, Lord Coke says, a feoffment cleareth all disseisins, abatements, intrusions, and other wrongful or defeasible estates; where the entry of the feoffor is lawful; which neither fine, recovery, nor bargain and sale by deed indented and enrolled, doth. And it is said, in The Touchstone, that it passeth the present estate of the feoffor; and not only so, but barreth and excludeth him of all present and future right, and possibility of right, to the thing which is so conveyed; insomuch, that if one have divers estates, all of them pass by his feoffment; and if he have any interest, rent, common, or the like, in, to, or out of the land, it is extinguished and gone by the feoffment. (*b*)

30. The most singular effect of a *feoffment* is, that it *operates on the possession, without any regard to the estate or interest of the feoffor;* so that, to make a feoffment good and valid, nothing is wanting but possession. Thus, Littleton says: "Tenant for years may make a feoffment in fee, and by his feoffment the fee-simple shall pass; and yet he had, at the time of the feoffment made, but an estate for term of years." And in Lord Coke's comment on this passage, he says: "Here it is implied,

(*a*) Tit. 18, c. 1, s. 26. 2 Inst. 244. Tit. 19 and 20.
(*b*) 1 Inst. 9 a. Shep. Touchst. 204.

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[1] In the United States, a corporation may be seised to any use, not foreign to the purposes of its creation; and therefore may convey by any deed deriving its operation from the Statute of Uses. See *ante*, tit. 11, ch. 2, § 15, note.

that albeit the feoffment, made by lessee for years, be a feoffment between the feoffor and feoffee, and that by this feoffment the fee-simple passeth by force of the livery, yet it is a disseisin to the lessor. (*a*)

The doctrine last above stated has been, in some respects, denied in a modern case, of which an account will be given hereafter. (*b*)

51* *31. It has been stated that a *feoffment by a tenant in tail*, [in possession,] who is actually seised by force of the entail, *creates a discontinuance* of the estate tail; by transferring to the feoffee, not only the possession, but also the right of possession; so as to take away the entry of the issue in tail, as also that of the persons in remainder, and of the reversioner, and to drive them to their real action. (*c*)

32. It has also been stated that a *feoffment in fee, by a tenant for life*, will create a *forfeiture* of his estate; for it transfers the fee-simple, and devests the estate in remainder, and the reversion. It is the same of a tenant for years. (*d*) [1]

33. A *gift, donatio*, is *properly applied* to the creation of an *estate tail;* as a feoffment is to that of an estate in fee-simple. It differs in nothing from a feoffment, but in the nature of the estate that passes by it, and livery of seisin must be given to the donee, to render it effectual. (*e*)

34. A *grant* is a conveyance, so far similar to a feoffment, that the *operative words* of it are *dedi et concessi, given and granted;* and as a feoffment was the regular mode of conveying corporeal hereditaments, so a grant was the *proper mode of transferring incorporeal ones;* hence the expression, that advowsons, commons, rents, &c. lie in grant. (*f*) [2]

35. As the objects of a grant are not capable of corporeal delivery, it follows that *livery of seisin cannot be given upon a*

(*a*) Lit. § 611, 698. 2 Inst. 244.
(*b*) Taylor *v.* Horde, tit. 36, c. 2.
(*c*) Tit. 2, c. 2, s. 7. 1 Inst. 327 b.
(*d*) Tit. 3, c. 1, § 34. Tit. 8, c. 2, § 47.
(*e*) Lit. § 59. West. Symb. s. 254.
(*f*) 1 Inst. 9 a. 172 a.

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[1] A conveyance of the fee, by tenant for life or years, by any deed deriving its effect from the Statute of Uses, works no forfeiture of his estate. And in many of the United States, a feoffment is equally innocent, it being held to convey only his own lawful interest. See *ante*, tit. 3, ch. 1, § 36, note (1); and tit. 8, ch. 2, § 47, note (1.)

[2] A right to erect mills and mill-dams on the land, is an incorporeal hereditament, and can pass only by grant. Thompson *v.* Gregory, 4 Johns. 81.

grant. But still it has always been held that a grant, accompanied with the *attornment* of the tenant, was as effectual as a feoffment with livery of seisin; and now the necessity of an attornment is taken away. (*a*)

36. Although a feoffment might formerly have been made by parol only, yet *a grant could not in general be made without deed;* because as the possession of those things which are the subject-matter of a grant could not be transferred by livery, there could be no other evidence of a grant but the deed.

37. The *proper words of a grant* are *dedi et concessi*, hath "*given and granted;*" but *any other words that show the intention of the parties will have the same effect.* Thus where A entered into an article with B, by which he granted and agreed that in consideration of a certain rent, B should have a way for himself * and his heirs over certain lands of A; *52 this was held to be a good grant of a right of way, not merely a covenant for enjoyment. (*b*)

38. *Grants* are used to *create incorporeal hereditaments,*[1] as in the preceding case. But a person *cannot grant or charge that which he has not at the time of the grant*, though he acquire it afterwards. Thus, if a person grants a rent charge out of the manor of Dale, when in fact he has nothing in the manor, and he afterwards purchases it, he shall hold it discharged from the grant. (*c*)

39. Manors, advowsons, rents, and all other incorporeal hereditaments, may be, and are often conveyed by grant, though *a bare right or possibility cannot be granted.*[2] Estates in remainder or reversion, consisting in a vested right, may also be conveyed by grant. Thus Littleton says, if a man lets tenements for a term of years, by force of which lease the lessee is

(*a*) Stat. 4 & 5 Ann. c. 16.
(*b*) 1 Inst. 147 a. Holmes *v.* Sellers, 3 Lev. 305. *Infra*, c. 20, s. 43.
(*c*) Perk. s. 65.

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[1] In *New York*, deeds of bargain and sale, and of lease and release, are by statute declared to be grants; and all conveyances seem to be subjected to the rules of law applicable to grants alone. N. York Rev. St. Vol. II. p. 22. 4 Kent, Comm. 491.

[2] The expectancy of an heir, whether apparent or presumptive, is not an interest or possibility capable of being the subject of a contract. Carleton *v.* Leighton, 3 Mer. 667. But see *infra*, ch. 6, § 38, note.

seised, the lessor may grant the reversion, by which the freehold will pass to the grantee, without livery of seisin. And Lord Coke observes on this passage, that, seeing this grant of the reversion must be by deed, the freehold and inheritance do pass thereby, as well as by livery of seisin, if it were in possession. (*a*)

40. Where a person is tenant for life, with remainder to his first and other sons in tail male, with the reversion in fee in himself; it is doubtful whether he can grant the reversion, as an interest distinct from his estate for life. (*b*)

41. The *operation of a grant*, by which any thing already in existence is conveyed, is materially different from that of a feoffment; for a feoffment operates immediately on the possession, without any regard to the estate or interest of the feoffee; whereas a grant only operates on the estate or interest of the grantor, and *will pass no more than what he is, by law, enabled to convey.* (*c*)

42. This rule probably arose from the circumstance, that a grant being always made by deed, the estate of the grantor might be known by inspection of the deed. If the estate granted was greater than the estate which the grantor had, it was merely void; and the grant only passed as much as the grantor could really give. And Lord Ch. B. Gilbert was of opinion, that the reason why a grant passes no more than 53 * what the grantor can lawfully *pass, is, because it is a secret conveyance; therefore ought not to be allowed to have so extensive an operation as a feoffment, in which livery of seisin is given. (*d*)

43. *A grant cannot in any case create a discontinuance,*† for every discontinuance works a wrong; whereas a grant only transfers what the grantor may lawfully give. Thus Lord Coke says, if tenant in tail of a rent service, or of a remainder or reversion in tail, grants the same in fee, and dies; this is no discontinuance to the issue in tail. (*e*)

(*a*) Tit. 16, c. 1, (Lit. § 567). Goodtitle *v.* Bailey, *infra*, c. 20, s. 42. (*b*) Tit. 18, c. 1, s. 6.
(*c*) 1 Inst. 251 b. (*d*) Gilb. Ten. 122. (*e*) 1 Inst. 322 a. 327 b.

† [See Stat. 3 & 4 Will. 4, c. 27, s. 39.]

44. It follows, from the same principle, that *a grant can, in no instance, create a forfeiture.* Thus, if a tenant for life, or years, of an advowson, rent, common, or of a remainder or reversion of land, grants the same in fee, this is no forfeiture, because nothing passes but that which lawfully may pass. (*a*)

(*a*) 1 Inst. 251 b.

CHAP. V.

LEASE.

SECT. 1. *Description of.*
9. *Where only an Agreement for a Lease.*
15. *Must have a certain beginning and ending.*
24. *May determine by a Proviso.*
25. *What may be leased.*
28. [*Not Dignities.*]
29. *Who may make Leases.*
29. [*Committees of Lunatics, note.*]
31. *Tenants in Tail.*
34. *Husbands seised* Jure Uxoris.
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38. *Circumstances required in these Leases.*
SECT. 58. *Parsons and Vicars.*
59. *Tenants for Life.*
61. *Tenants by the Curtesy and in Dower.*
62. *Tenants for Years.*
64. *Guardians.*
66. *Executors and Administrators.*
67. *Joint Tenants, Coparceners, and Tenants in Common.*
69. *Copyholders.*
70. *Who are incapable of making Leases.*
71. *Infants.*
73. *Married Women.*
74. [*Trustees.*]
75. *Void and Voidable Leases.*
93. *Who may be Lessees.*

SECTION 1. A lease is *a contract for the possession and profits of lands and tenements on the one side; and a recompense of rent, or other income on the other.* Or else, it is a conveyance of lands and tenements to a person for life, for years, or at will, in consideration of a return of rent, or other recompense. Where a freehold estate is created by lease, livery of seisin must be given to the lessee. And where the lease is for a term of years, there must be an entry by the lessee. (*a*)

2. The words "*demise, lease, and to farm let,*" are the proper ones to constitute a lease. But *any other words, which show the intention of the parties,* that one shall devest himself of the possession, and the other come into it, for a certain time, whether they run in the form of a license, covenant, or agreement, *are of themselves sufficient;* and will, in construction

(*a*) Tit. 8, c. 1.

* of law, amount to a lease, as effectually as if the most * 55
proper words had been used for that purpose. (*a*)† [1]

3. Articles in writing indented were made between A and B in these words: *Imprimis*, It is covenanted and agreed between the parties, that A doth let the said lands, for and during five years, to begin at the Feast of St. Michael next following: Provided always, that the said B should pay to A annually, during the term, £120. Also the said parties do covenant that a lease shall be made and sealed according to the effect of these articles, before the Feast of All Saints next ensuing. (*b*)

The question was, whether this was an immediate lease, or only an agreement to have a lease made. All the Judges held it to be a good lease. For the words, it is agreed that A doth let, being in the present tense, was a good lease, by the words of the agreement; and that which followed was in reference to further assurance.[2]

(*a*) 1 Inst. 45 b. Bac. Ab. tit. Lease, K. Tooker *v.* Squier, 3 Danv. Abr. 207, p. 1, 3; 231, p. 10. Cro. Jac. 172. Hall *v.* Seabright, 1 Mod. 14.

(*b*) Harrington *v.* Wise, Cro. Eliz. 486.

[† Executory agreements for leases of copyholds are construed differently on account of the forfeiture. *Vide* tit. 10, c. 5.—*Note to former edition.*]

[1] See, accordingly, Watson *v.* O'Hern, 6 Watts, 362; Moshier *v.* Reding, 3 Fairf. 478.

Letting land on shares for a single crop, or under an agreement to sow certain crops, rendering a certain portion thereof to the owner of the land, is but an agreement to work on shares, and not a lease. Bradish *v.* Schenck, 8 Johns. 151; Caswell *v.* Districh, 15 Wend. 379; Maverick *v.* Lewis, 3 McCord, 211.

But letting the land for a year constitutes a lease, though it be stipulated that the owner shall receive a share of the crops for the use of the land. Jackson *v.* Brownell, 1 Johns. 267.

The relation of landlord and tenant does not arise between the vendor and vendee of land. Watkins *v.* Holman, 16 Peters, 25; Winterbottom *v.* Ingham, 7 Ad. & El. 611, N. S.; Carson *v.* Baker, 4 Dev. 220; *Ante*, tit. 9, ch. 1, § 3, note.

[An executory contract for the purchase of land, with leave to the purchaser to enter and possess until default in the payment of the purchase-money, without any fixed period or compensation, is a license, and not a lease. Dolittle *v.* Eddy, 7 Barb. Sup. Ct. 74. See Kirk *v.* Taylor, 8 B. Mon. 262.]

[2] So, where one said, "You shall have a lease of my lands in D. for 21 years, paying therefor ten shillings per annum; make a lease in writing and I will seal it;" this was held a good lease, for the like reason as in the text. Maldon's case, Cro. El. 33.

[An instrument by which the owner of land "agrees to lease and rent" it to another, and the latter "agrees to rent the premises on the terms and conditions above ex-

4. Articles were entered into between A and B, by which A covenanted, granted, and agreed that B should have the land for six years; in consideration of this, B covenanted to pay a yearly rent to A. Resolved, that this was a good lease. (*a*)

5. Two persons entered into an agreement with one Brown, that they would, with all convenient speed, grant him a lease of, and they *did thereby set and let* to him, the premises in question; to hold for 21 years, at a certain rent, payable half-yearly to the lessors; the lease to contain the usual covenants, and certain special ones, in one of which the words *this demise* occurred. The Court held, that this was a good lease *in præsenti*, with an agreement to execute a more formal one. The operative words, *let* and *set*, were in the present tense; and a reference was made to *this demise*. (*b*)

6. An instrument, purporting to be a demise for 21 years, was as follows:—"Be it remembered that J. B. hath let, and by these presents *doth demise*, &c., unto R. F. for 21 years, to commence after the said J. B. hath recovered the said lands from M. O. Leases, with powers of distress, and clauses for reëntry, &c., to be drawn and signed at the request
56* *of either party, as soon as J. B. recovers the said lands from M. O." (*c*)

7. The Court was of opinion that this instrument operated as a present demise; and that the agreement for a more formal lease was merely in further assurance. (*d*)

8. [To the preceding, the cases cited below † may be added;

(*a*) Drake *v.* Munday, Cro. Car. 207. Tisdale *v.* Essex, Hob. 34.
(*b*) Baxter *v.* Browne, 2 Black. R. 973.
(*c*) Barry *v.* Nugent, 5 Term R. 165. (3 Doug. 179. 2 Tidd's Pr. 914.)
(*d*) Right *v.* Proctor, 4 Burr. 2208.

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pressed," is a demise and not a contract to give a lease. Averill *v.* Taylor, 4 Selden, (N. Y.) 44. In general, where one stipulates that another shall have the use, benefit, and enjoyment of real estate, definitely described, accompanied by an actual entry and enjoyment of the estate, this is evidence of a present devise. Dutton *v.* Gerrish, 9 Cush. 93.]

[† Poole *v.* Bentley, 12 East, 168; Doe *v.* Groves, 15 East, 244; Pinero *v.* Judson, 6 Bing. 206; Staniforth *v.* Fox, 7 Ib. 590; Doe *v.* Reis, 8 Ib. 178.] (The following were also cases of present demise. Warman *v.* Faithful, 5 B. & Ad. 1042; Wright *v.* Trevezant, 3 C. & R. 441; Wilson *v.* Chisholm, 4 C. & P. 474; Doe *v.* Reis, 8 Bing. 178; Pearce *v.* Cheslyn, 4 Ad. & El. 225; Alderman *v.* Neate, 4 M. & W. 704; Doe *v.*

all of which agree in the two important particulars, that immediate possession was given, and the rent commenced forthwith.]

9. On the other hand, although the most proper form of words of leasing be used, yet *if, upon the whole deed, there appears no such intent, but that it is only preparatory, and relative to a future lease to be made;* the law will rather do violence to the words, than break through the *intent of the parties*, by construing it a present lease, when the intent is manifestly otherwise.[1]

10. Articles were drawn between A and B in this manner: — *Imprimis*, A doth demise such a close to B, to have it for forty years, and a rent reserved, with a clause of distress, &c. Afterwards there was written in the same paper, a memorandum that these articles were to be ordered by counsel of both parties, according to due form of law. (*a*)

Here, because the intent of both parties appeared by that memorandum, and by a lease actually drawn by the counsel, but never sealed, the parties disagreeing about fire-bote, it was ruled by the Court, upon evidence in ejectment, that these articles were not a sufficient lease. (*b*)

11. Upon a trial in ejectment, the defendant produced in evidence an agreement in writing, unstamped, between Lord Abingdon and the defendant's father, in the latter part of which were these words: And further, the said Earl doth hereby agree to let, and the said R. W. agrees to rent and take, &c., all his estate at Rycot. It is agreed, that the said R. W. shall enter on all the said premises immediately, but not commence payment of rent till Lady-day next. It is further agreed, that leases with the usual covenants, shall be made and executed by the parties on or before Michaelmas next. (*c*)

The Court of King's Bench, on a motion for a new trial, was of opinion that this was not a lease. The case of Sturgion *v.* *Painter, they said, was in point. In this case *57

(*a*) Sturgion *v.* Painter, Noy, R. 128. (*b*) Plesaunts *v.* Higham, 1 Roll. Ab. 848.
(*c*) Goodtitle *v.* Way, 1 Term R. 735.

Benjamin, 9 Ad. & El. 644; Curling *v.* Mill, 7 Scott, N. R. 709; Tarte *v.* Darby, 15 M. & W. 601.)

[1] An agreement by the owner of a mill, to secure it to the millwright for his services until the profits should satisfy his claim, has been held to amount only to an agreement for a lease. The People *v.* Gillis, 24 Wend. 201.

there was also an express stipulation that leases should be drawn before Michaelmas. Therefore, it was plainly not the intention of the parties that such agreement should operate as a lease; but only that it should give the defendant a right to the immediate possession, till a lease could be drawn. (*a*)

12. Articles of agreement were entered into between T. S. and D. J., respecting fulling mills and other conveniences, in which were these words: — "That the said mills and conveniences, with the islands and acre of land called Ashacre, he shall enjoy. And I engage to give him a lease in, for the term of 31 years from Whitsuntide, 1784, at the rent, &c.; and that I will purchase one yard in breadth to be laid to the Race from the High Clews, the length of Charles Close. And if it be bought, and the purchase is more than £200 per acre, he, the said D. J. to pay more than it costs beyond that rate," &c. (*b*)

A question arose in ejectment on this article, whether it was an actual lease, or only an agreement for a lease. After argument in the King's Bench, Lord Kenyon said, the question turned on the intention of the parties, as it was to be collected from the whole agreement. The words were, he shall enjoy; and I engage to give him a lease, &c.; and the question was, what was the intention of the parties using those expressions? Was it that this agreement should confer the legal interest; or was it not in their contemplation that there should be another instrument to give that legal interest? The latter words clearly showed that it was the intention of the parties, that there should be some further assurance. It was in *fieri* at the time; and if a bill had been filed in a court of equity, for a specific performance of the agreement, that court would not have turned the plaintiff round, and told him that he already had a legal and executed contract; but would have decreed a lease of the premises, according to the agreement. If the former words in this contract had not been restrained by the engagement to give a lease in future, they would have operated as a perfect lease. But as the parties agreed, the one to give, the other to receive, a future lease, he could not conceive that this was intended to be a perfect lease. Besides, by another part of the agreement, the landlord was to acquire an additional piece of ground, to be laid to

(*a*) *Ante*, s. 10.

(*b*) Roe *v.* Ashburner, 5 Term R. 163.

the mill, without which the lease was not to be granted; this, also, * was of importance to show that there was to *58 be some future instrument, to give a title to the plaintiff. All the cases cited might be answered by the observation that there were either express words of present demise, or equivocal words, accompanied with others, to show the intention of the parties, that there should not be a future lease. But in this case, where the context, in which were the words *shall enjoy*, imported that the parties did not mean that they should operate as a present demise, he thought they would decide contrary to the intention of the parties, if they were to determine that they should have that effect. It was resolved, that the instrument only amounted to an agreement for a lease. (*a*)

13. [To the preceding cases, those cited in the note (†) may be added, in which the instrument was held to be an agreement and not a present demise.

14. The cases upon the question, whether the instrument is to be construed a present demise, or only an executory contract, turns upon very nice distinctions, and the cases are in some respects conflicting; but it would seem that the intention of the parties is the proper criterion for the construction of the instrument. The following circumstances have been considered *primâ facie*, as indicating an intention that the instrument should be considered only an agreement, namely, *a stipulation for the execution of a future lease*, or, *for the performance of some act previous to the entry of the tenant*, or, *the payment of rent.* On the other hand, *where immediate possession is taken*, or, *the tenant has the immediate right of entry;* and the *rent is payable immediately*, or, *before the execution of any future lease, or performance of a future act*, there the instrument will be held a present demise,

(*a*) Browne *v.* Warner, 14 Ves. 156, 409. (And see Doe *v.* Browne, 8 East, 164.)

[† Morgan *v.* Bissell, 3 Taunt. 64; Tempest *v.* Rawling, 13 East, 18; Dunk *v.* Hunter, 5 Bar. & Ald. 324; Clayton *v.* Burtenshaw, 5 B. & Cress. 41.] (And see Doe *v.* Smith, 6 East, 530; Jones *v.* Reynolds, 1 G. & Dav. 62; Rawson *v.* Eicke, 7 Ad. & El. 451; Chapman *v.* Towner, 6 M. & W. 100; Brashier *v.* Jackson, 6 M. & W. 549; Bicknell *v.* Hood, 5 M. & W. 104; Burnell *v.* Curtis, 4 Jur. 490; Hegan *v.* Johnson, 2 Taunt. 148; Phillips *v.* Hartley, 3 C. & P. 121; Colley *v.* Streeton, 2 D. & R. 522; John *v.* Jenkins, 1 C. & M. 227; 3 Tyr. 170; Doe *v.* Clarke, 7 Ad. & El. 211, N. S.; Doe *v.* Foster, 3 M. G. & S. 215; Clarke *v.* Moore, 1 Jon. & Lat 723.)

and not an agreement; unless, indeed, forfeiture would be the consequence of such construction.] (*a*)[1]

15. *Every lease must contain a sufficient degree of certainty*, as to its *beginning*, *continuance*, and *ending*. If a lease be made to begin from an *impossible* date, as from the 30th February, it will take effect from its delivery. But where the date or time when a lease is to commence is *uncertain*, as where a lease was made *habendum* from the 20th November, without saying what November, this uncertainty will render the lease void. (*b*)

59* *16. If a lease be made by indenture, bearing date 26th May, to hold for 21 years from the date, or day of the date; it shall begin on the 27th of May.[2] If the lease bear date the 26th May, to hold from the making hereof, or from henceforth, it shall begin on the day on which it is delivered. For the words of the indenture are not of any effect till the delivery; and thereby, from the making, or from henceforth, take their first effect. But if it be *à die confectionis*, then it shall begin on the day after the delivery. (*c*)

17. This doctrine has been denied in two modern cases, in which it has been held that the word *from* may, in the vulgar sense, and even in strict propriety of language, mean either inclusive or exclusive. And where a lease can only be supported

(*a*) Doe *v.* Clare, 2 T. R. 739. Lufkin *v.* Nunn, 11 Ves. 170.
(*b*) 1 Inst. 48 b. Bac. Ab. tit. Lease, L. 1 Mod. 180.
(*c*) 1 Inst. 46 b. Clayton's case, 5 Rep. 1.

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[1] In Poole *v.* Bentley, 12 East, 168, Ld. Ellenborough observed, that "the rule, to be collected from all the cases is, that the *intention* of the parties, *as declared by the words of the instrument*, must govern the construction." The question there was, whether the contract amounted to a lease, or was only an agreement for a lease; and it was held a lease, on the ground that the tenant was to have immediate possession, and to expend money in improvements. This rule was afterwards approved by Park, J., who added, that the intention of the parties might be elucidated by the conduct they had pursued; and referred to Morgan *v.* Bissell, 3 Taunt. 64; Goodtitle *v.* Way, 1 T. R. 735, and Baxter *v.* Browne, 2 W. Bl. 793. See Chapman *v.* Black, 4 Bing. N. C. 187; 5 Scott, 415, S. C. See, also, Doe *v.* Powell, 8 Scott, N. R. 687; Curling *v.* Mills, 6 Man. & Gr. 173; Perring *v.* Brooke, 1 M. & Rob. 510.

[2] Where a house was demised, *habendum* for 21 years from March 25th, 1809, paying rent on certain days in each year, of which March 25th, was one; it was held that the term did not expire until the end of March 25th, 1830. Ackland *v.* Lutley, 9 Ad. & El. 870.

by construing the word *from* inclusive, a Court ought to give it that sense. (*a*) [1]

(*a*) Freeman *v.* West, 2 Wils. R. 165. Pugh *v.* D. of Leeds, *infra*, c. 15, § 23.

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[1] The question, whether the day of a date or an event is to be included or excluded, in the computation of time, has been very much discussed; but no imperative and universal rule has yet been established. It is left to depend on the intent of the parties; to be ascertained either from the face of the instrument, or from the reason of the thing, and the circumstances. Lester *v.* Garland, 15 Ves. 248; Presbrey *v.* Williams, 15 Mass. 194. When there is nothing else to guide the construction, that one is assumed which is most beneficial to the party, in whose favor the instrument was made, or an interest passes. Lyle *v.* Williams, 15 S. & R. 136; Donaldson *v.* Smith, 1 Ashm. 197; Bigelow *v.* Willson, 1 Pick. 494; Presbrey *v.* Williams, 15 Mass. 194. [The State *v.* Schnierle, 5 Rich. 299.]

1. The expressions "from the date," and "from the day of the date," are now held to mean the same thing. Clayton's case, 5 Rep. 1; Pugh *v.* D. of Leeds, Cowp. 714. And the general rule of law is rather to *exclude* than to include the day of the date or event from which the time is to be computed; partly, because the law does not regard fractions of a day, unless it be to prevent injustice, or to establish the priority of conflicting titles; and partly, because, otherwise, the one party might have no time to do the act which he was to do, dependent on the act done by the other; as, for example, to make a tender. Bigelow *v.* Willson, *supra;* Clinch *v.* Smith, 8 Dowl. P. C. 337; 4 Jur. 86.

But where a *present interest* is intended to pass, the day of the date is included. Pierpont *v.* Graham, MSS. cited in Whart. Dig. p. 720; Lyle *v.* Williams, *supra;* Hatter *v.* Ash, 1 Ld. Raym. 85, per Powell, J.; Osbourn *v.* Ryder, Cro. Jac. 135.

2. Where the time is to be computed *from an act done*, the general rule is to *include* the day on which the act was done; but where the computation is to be made from *the day of the act done*, the day is excluded. Castle *v.* Burditt, 3 T. R. 623; Norris *v.* Gawtry, Hob. 139; Rex *v.* Adderley, 2 Doug. 464, per Ld. Mansfield; Bellasis *v.* Hester, 1 Ld. Raym. 280; Hampton *v.* Erenzeller, 2 Browne, R. 18; Pierpont *v.* Graham, *supra;* Blake *v.* Crowninshield, 9 N. Hamp. 304; Ex parte Dean, 2 Cowen, 605. [See Thomas *v.* Afflick, 16 Penn. State R. 14; Chiles *v.* Smith, 13 B. Mon. 460; Weeks *v.* Hull, 19 Conn. 376; Hall *v.* Cassidy, 25 Miss. 48.] But in Massachusetts, it is held, upon great consideration, that the day in both these cases is to be excluded. Bigelow *v.* Willson, *supra;* Wiggin *v.* Peters, 1 Met. 127, 129. And see Ewing *v.* Bailey, 4 Scam. 420. [And where the time commenced "at" the date, the day of the date was excluded. Farwell *v.* Rogers, 4 Cush. 460.]

A distinction, however, is admitted between cases where the party, against whom the time is to be computed from an act done, was privy to the act, and where he was not; by including the day in the former case, and excluding it in the latter. Lester *v.* Garland, *supra;* Bellasis *v.* Hester, *supra.* Thus, where, by statute, excise officers were not suable until "one calendar month after *notice* in writing;" it was held that the day of the notice was to be included. Castle *v.* Burditt, *supra.* So, where a trader, lying in prison two months after *arrest*, was to be deemed a bankrupt, the day of the arrest was included. Glassington *v.* Rawlins, 3 East, 407. So, where continual *claim*, to prevent a descent from barring the right of entry, was to be renewed within a year and a day, the day of the claim was included. 1 Inst. 255 a. And see Long *v.* McClure, 5

18. Lord Kenyon has said, that if a lease be granted for 21 years, to commence after the death of three lives then in being,

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Blackf. 319. So, where the right of action is barred by the lapse of six years after it accrued, the day of its accrual is included. Presbrey *v.* Williams, *supra.*

3. But the day will be either included or excluded, as the case may require, in order to save a forfeiture, or avoid a penalty, or prevent an estoppel.

Thus, where a devise was on condition that the devisee should give a certain bond within six months after the testator's decease; the day of his decease was *excluded.* Lester *v.* Garland, *supra.* So, in computing the year, within which an action against the hundred for robbery must be brought, the day of the robbery was *included.* Norris *v.* Gawtry, *supra.* So, the liability of the sheriff to the *penalty* of an attachment for not returning process, on motion made in six months after his going from office, was held to expire in six months *inclusive* of the day of the expiration of his office. Rex *v.* Adderley, *supra.* But the two months, within which the town having notice in writing that a pauper had become chargeable, must reply to the notice, or be *estopped* from denying his settlement, is to be computed *exclusive* of the day of notice. Windsor *v.* China, 4 Greenl. 298. So, in computing the year, within which a right in equity of redemption, which has been sold on execution, may be redeemed by the debtor, computing from the time of executing the sheriff's deed, the day of executing the deed is *excluded.* Bigelow *v.* Willson, *supra.* And see acc. The People *v.* The Sheriff of Broome, 19 Wend. 87; Snyder *v.* Warren, 2 Cowen, 518. So, in computing the time for the enrolment of deeds, the day of their execution is *excluded.* Thomas *v.* Popham, Dyer, 218 b.

The day of the date of a patent, also, is excluded from the computation of the period for which it is granted, in favor of the patentee. Watson *v.* Pears, 2 Campb. 294; Russell *v.* Ledsam, 14 M. & W. 574.

4. In *matters of legal practice*, it is now settled by the rules of the Courts in Westminster Hall, that in all cases in which any particular number of days, not expressed to be *clear* days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusive of the first day, and inclusive of the last day; but excluding from the computation all Sundays, and all public festivals and fasts. See 1 Dowl. P. C. 300; 8 Bing. 307; 3 B. & Ad. 393; 2 Tyrw. 352. The rule in Chancery is the same. Gen. Ord. May, 1845; Ord. 11; 1 Daniel, Ch. Pr. 404; Bullock *v.* Edginton, 1 Sim. 481; Manners *v.* Bryan, 5 Sim. 147; Milburn *v.* Lyster, Ibid. 565.

The general practice of the Courts in the United States has always been the same, but the cases are too numerous for citation.

But where the period limited by a *statute* is such as necessarily to include Sundays, or festivals and fasts, they are to be included in the enumeration of the days, unless there is an express or a manifest intention in the legislature to exclude them. See Goswiller's case, 3 Pennsylv. R. 200; Alderman *v.* Phelps, 15 Mass. 225; Thayer *v.* Felt, 4 Pick. 354.

5. By the term "*month*," in the *United States*, whether found in statutes or used in contracts or elsewhere, is now understood a *calendar* month; unless where it is otherwise expressed. Hunt *v.* Holden, 2 Mass. 170; Alston *v.* Alston, 2 Const. R. 604; Commonwealth *v.* Chambre, 4 Dall. 143; Pyle *v.* Maulding, 7 J. J. Marsh. 202; Strong *v.* Birchard, 5 Conn. 357; 4 Kent, Comm. 95, note; Story on Bills, § 143, 330. [Bartol *v.* Calvert, 21 Ala. 42; Brewer *v.* Harris, 5 Gratt. 285. But see Rives *v.* Guthrie, 1 Jones Law, (N. C.) 84.] It was formerly understood as a lunar month,

it will be good. For though it be uncertain at first, when the term will commence, yet when the lives die, it is reduced to a certainty. (*a*)

19. Where a lease was made in the year 1780, to hold from the feast of St. Michael, it was held that this must be taken to mean New Michaelmas, and could not be shown by extrinsic evidence to refer to a holding from Old Michaelmas. (*b*)

20. It has been stated, that the word *term* not only signifies the period of time for which the estate is to continue, but also the estate and interest itself. And therefore, it was for-

(*a*) 3 Term R. 463. Dyer, 124. 6 Rep. 34 b. (*b*) Doe *v.* Lea, 11 East, 312.

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when used in statutes, in New York and in Georgia; but it has been altered to calendar months. [When a month is referred to, without any designation of the year, it will be understood to be of the current year, unless from the connection it is apparent that another year is intended. Tillson *v.* Rowley, 8 Greenl. 163; Kelly *v.* Gilman, 9 Foster, (N. H.) 392.]

But in *England*, "*a month*," in legal matters, means a lunar month; in mercantile and ecclesiastical law, it means a calendar month; and in other transactions, it may mean a lunar or a calendar month, according to the intention of the parties. See 2 Bl. Comm. 141; Hart *v.* Middleton, 2 Car. & Kir. 9, per Pollock, B.; Lang *v.* Gale, 1 M. & S. 111, 117; Lacon *v.* Hooper, 6 T. R. 224; Hipwell *v.* Knight, 1 Y. & C. 401; Regina *v.* Chawton, 1 Ad. & El. 247, N. S.

[In *New York*, by the method of computing time established by the revised statutes, a day consists of twenty-four hours, and commences and ends at midnight. Pulling *v.* The People, 8 Barb. Sup. Ct. 384.]

6. The words "*from and after the passing of this act*," in a statute laying additional duties on goods imported, have been held to include the day on which the act was passed; on the general rule, that from an *act done* included the day on which it was done. Arnold *v.* The United States, 9 Cranch, 104. But the like words were held exclusive of the day, in King *v.* Moore, Jefferson, Rep. 9. And see Jackson *v.* Van Valkenburgh, 8 Cowen, 260; Sanders *v.* Norton, 4 Monr. 464; Homan *v.* Liswell, 6 Cowen, 659; Bigelow *v.* Willson, *supra*; [Judd *v.* Fulton, 10 Barb. Sup. Ct. 117.]

It seems that the word "*until*," is *inclusive* of the day to which it is prefixed. Dakins *v.* Wagner, 3 Dowl. P. C. 535.

7. The doctrine, that in law there is no fraction of a day, is a mere legal fiction, true only *sub modo*, and in a limited sense, where it will promote the right and justice of the case, and never allowed to prevail, unless it be in furtherance and protection of rights, *pro bono publico*. In re Richardson, 2 Story, R. 571, 577, 579. Therefore, where a petition for a decree of bankruptcy was filed by the bankrupt on the day on which the act was repealed, it was held competent for the petitioner to show, that the petition was in truth filed several hours before the repealing act was approved by the President. Ibid. And see Metts *v.* Bright, 4 Dev. & Bat. 173; Johnson *v.* Pennington, 3 Green, R. 188. [See Regina *v.* Edwards, 24 Eng. Law and Eq. 440; Edwards *v.* Regina, 25 Ib. 519; In re Welman, 20 Vt. 653. The statute of 21 Henry 3, by which the 28 and 29 February are reckoned as one day, is in force in Indiana. Swift *v.* Tousey, 5 Ind. (Porter,) 196. See also N. Y. Rev. Stat. (4th ed.) (Denio & Tracy,) Vol. II. p. 1.]

merly held, that if a person made a lease for 21 years, and after made a lease to begin *a fine et expiratione prædicti termini* 21 *annorum*, after which the first lease was surrendered; the second lease would commence immediately. But if it had been to begin *post finem et expirationem prædict'* 21 *annorum;* in that case, though the first term were surrendered, yet the second lease should not begin till after the 21 years were expired, by effluxion of time. But this doctrine has been denied in a modern case, in which it has been held that the word *term* may signify the time, as well as the interest. (*a*)

21. As to the continuance of a lease, it must also have a certainty; but *id certum est quod certum reddi potest.* Therefore a lease for so many years as J. B. shall name, is a good
60 * lease. For * though it is at first uncertain, yet when J. B. hath named the years, it is then reduced to a certainty. Thus, if a person makes a lease for so many years as he shall live;[1] or if the parson of D. makes a lease of his glebe for so many years as he shall be parson there; these leases are said to be absolutely void, on account of the uncertainty of their continuance. But if a lease be made for 21 years, or any other certain number of years, provided the lessor or lessee shall so long live, or continue parson of D., it will be good; for the lease is confined to a certain number of years, though it may determine sooner. (*b*)

22. A lease was made for seven, fourteen, or twenty-one years. It was contended that it was void for uncertainty; but the Court held, it was at least a lease for seven years; then if the lessee continued, it was for fourteen; and if after that he continued, it was for 21 years. (*c*)[2]

(*a*) Tit. 8, c. 1. 1 Inst. 45 b. Chedington's case, 1 Rep. 158. Wright *v.* Cartwright, 1 Burr. 282. Lord K. R. 525. (*b*) 1 Inst. 45 b.

(*c*) Ferguson *v.* Cornish, 2 Burr. 1034. 3 Term R. 468. (And see Goodright *v.* Mark, 4 M. & S. 30.)

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[1] Though such a lease is not good as a lease *for years*, because of the uncertainty; *quære*, whether it may not be a good lease for the life of the lessor?

[2] A lease for no definite period, but upon an annual rent payable quarter-yearly, is a lease from year to year. Lesley *v.* Randolph, 4 Rawle, 123. So, where a father admitted his son into the possession of his farm, on condition that the son would support him, this was held a tenancy from year to year by the son. Hanchett *v.* Whitney, 2 Aik. 240. And where it was agreed, that the tenant should occupy the premises until he had reimbursed himself for repairs, this also has been held a tenancy from year to year. Thomas *v.* Wright, 9 S. & R. 87.

23. In a modern case, the Court of King's Bench held, that a lease for three, six, or nine years was determinable at the end of three or six years, by *either* of the parties; on giving reasonable notice to quit. But in a subsequent case, the Court of Common Pleas certified to the Court of Chancery, that where a lease was granted for seven, fourteen, or twenty-one years, the *lessee* only had the option at which of those periods the lease should determine. (*a*)

24. Although a lease must, at its creation, have a precise period fixed, beyond which it is not to continue, yet it *may be made to determine* prior to that period, *by a proviso or condition.* And in all modern leases there is a proviso, that if the rent is not paid, and no sufficient distress is found on the premises, the lessor may reënter. (*b*)

25. *All lands whereof a person is in possession may be leased.*[1] There are also *some kinds of incorporeal hereditaments* which may be leased. Thus an *advowson* appendant may be leased with the manor to which it is annexed, or separate from it, and an advowson in gross may also be leased. (*c*)

26. *Tithes*, whether in the hands of ecclesiastics or lay impropriators, may be leased; and, in the case of ecclesiastics, a rent may be reserved, by a particular statute, on such leases. As to lay impropriators, a rent may also be reserved under the statute of 32 Hen. VIII. c. 7. (*d*)

*27. *Offices*, which do not concern the administration of justice, but only require skill and diligence, may be leased *61

(*a*) Goodright *v.* Richardson, 3 Term R. 462. Denn *v.* Spurrier, 3 Bos. & Pul. 399, 442. (7 Ves. 281. Price *v.* Dyer, 17 Ves. 363.)

(*b*) *Infra*, s. 86, &c.

(*c*) Davenport's case, 8 Rep. 144. 10 Rep. 65 b.

(*d*) Tit. 28, c. 1. Tit. 22, s. 67.

[A lease of a lot for twenty-one years, contained a covenant that the landlord, at the expiration of the term, should pay the tenant the appraised value of a dwelling-house to be erected thereon by the latter, or otherwise grant him a new lease for a like term, at a rent equal to seven per cent. per annum, on the appraised value of the lot. Held, that the tenant might retain possession of the premises after the expiration of the term, until the landlord or his representatives performed such covenant; that he became a tenant from year to year, subject to the terms of the original lease; and that the landlord was not entitled to rent proportioned to the increased value of the premises. Holsman *v.* Abrams, 2 Duer, (N. Y.) 435.]

[1] [In *North Carolina*, turpentine trees are the subject of lease. Rooks *v.* Moore, Busbee Law, N. C. 1.]

for years; because they may be executed by deputy, without any inconvenience to the public. (*a*)

28. [But *dignities*, which are only grantable by the Crown, cannot be demised for years, as appears from Sir George Reynel's case.] (*b*)

29. *All natural persons who are capable of alienating* their property, or of *entering into contracts* respecting it, and *all lay corporations*, may make leases; which will endure as long as their interest in the thing leased, but no longer †

30. Leases made by persons having no estate in the lands at the time, may become good by estoppel; of which an account will be given hereafter. (*c*)

31. All leases made by *tenants in tail*, might by the common law have been avoided by their issue, and by the persons entitled to the remainder or reversion.

32. But by the statute 32 Hen. VIII. c. 28, s. 1, it is enacted, that all leases made for a term of years, or life, by any person or persons, being of full age, having any estate of inheritance, either in fee simple, or in fee tail, shall be good and effectual in law against the lessors and their heirs. This statute does not, however, extend to persons having estates in remainder or reversion, expectant on the determination of an estate tail; who are not bound by any leases made by the tenant in tail.

33. A lease by tenant in tail, which is warranted by this statute, though made by feoffment and livery, will not create a discontinuance. Because an act of parliament, to which every man is a party, allows of such leases, which, if tortious, as all
62 * * discontinuances are, parliament would not allow. But if a lease by feoffment be not warranted by the statute 33 Hen. VIII. it will operate as a discontinuance. (*d*)

34. It is enacted by the same statute, that all leases made for

(*a*) Jones *v.* Clerk, Hard. 46. (*b*) Co. Lit. 16 b. 9 Rep. 97 b.
(*c*) *Infra*, c. 20. (*d*) 1 Inst. 338 a. Vaugh. 383. Walter *v.* Jackson, 1 Roll. Ab. 633.

[† By the statute of 1 Will. 4, c. 65, (repealing former statutes on the subject,) committees of lunatics are empowered, by the direction of the Lord Chancellor in England or Ireland, to make and receive surrenders of leaseholds, for the purpose of taking and granting renewed leases (ss. 18, 19); to execute powers of leasing, vested in lunatics having only a limited estate (s. 23); and also to grant leases or under-leases, for building, repairing, or otherwise, of lands of which the lunatic is seised in fee or in tail, or of leaseholds for years, in which he has an absolute interest. (s. 24).]

a term of years, or life, by persons having an estate of inheritance *in right of their wives*, or *jointly with their wives*, of any estate of inheritance, made before the coverture, or after, shall be good and effectual in law, against the lessors, their wives and their heirs; provided that the wife be made a party to every such lease, and the lease be made by indenture in the name of the husband and wife, and she do seal the same, and that the rent be reserved to the husband and wife, and the heirs of the wife, according to her estate of inheritance in the same. And that the husband shall not in any wise aliene, discharge, grant, or give away the same rent longer than during the coverture, except by fine levied by the husband and wife; but that the same rent shall remain, after the death of the husband, to the person to whom the lands would have gone, if no such lease had been made. (*a*) [1]

35. If the circumstances required by the statute are not observed, leases by husband and wife, of the wife's lands, are not binding on wives surviving their husbands. If the wives die in the lifetime of their husbands, their heirs may avoid them. (*b*)

36. At common law, leases made by ecclesiastics, of lands whereof they were seised *in right of their churches*, &c., were in many cases not binding on their successors; it was therefore enacted, by the statute 32 Hen. VIII. c. 28, that all leases for term of years, or life, by any persons having an estate of inheritance in right of their churches, shall be good and effectual against the lessors and their successors.[2]

(*a*) (Smith *v.* Trinder, Co. Car. 22.) (*b*) Doe *v.* Weller, *infra*, § 79.

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[1] The principle of this section of the statute of 32 Hen. 8, c. 28, has been adopted in practice generally in the United States; it being competent for the husband and wife, by their *joint* deed, to aliene, charge or encumber her inheritance at pleasure. But the husband alone cannot discontinue or affect the inheritance of the wife, without her consent, except to the extent of his title by the curtesy. See 2 Kent, Comm. Lect. 28; *supra*, ch. 2, § 24, note. This section is in force, in its terms, in *Kentucky*. See Rev. St. 1834, Vol. II. p. 1108. And it is substantially enacted in *North Carolina*. Rev. St. 1837, ch. 43, § 9.

[2] Where this subject has not been regulated by statute, it is believed to be governed, in this country, by the principles of the common law. The minister for the time being, holds the parsonage or glebe lands in fee-simple, in the right of his parish or church; and on his resignation, deprivation, or death, the fee is in abeyance, until there be a successor. His lease or alienation, *sine assensu parochiæ*, is valid only against himself;

37. There are several other statutes by which all alienations by ecclesiastical persons are declared void, except leases for twenty-one years, or three lives. And as the statute 32 Hen. VIII. is called an enabling statute, these are called disabling statutes. (*a*)

38. The *circumstances required* by the statute 32 Hen. VIII., and the subsequent statutes, to render leases made by tenants in tail, husbands seised in right of their wives, and ecclesiastical persons, valid and binding on their heirs and successors, 63* are *chiefly these: I. All such leases must be *by deed indented*, not by deed poll, or by parol. II. They must be made to *begin from the day of the making thereof*, or from the making thereof. III. If there be an *old lease* in being, it *must be surrendered* or *ended within one year next after the making of the new lease.* (*b*)

39. Such surrender must be absolute, not conditional; for then the intention of the statute might easily be evaded by setting up such old lease again, upon breach of the condition.

40. A surrender in law, by the taking of a new lease, either to begin presently, or on a day to come, seems a good surrender within the statutes. For by taking such new lease, though to commence on a future day, the first lease is presently surrendered, and gone; and shall not continue till the day on which the new lease is to commence; but by acceptance of such new lease, the first is immediately surrendered, because both leases cannot exist together. As the first cannot be dissolved, or surrendered in part, it must be surrendered for the whole. (*c*)

41. A surrender, upon condition that the lessor should make a new lease within a week after, has been held good.

42. The lessor of the plaintiff, being a prebendary of Sarum, brought an ejectment to avoid a lease made by his predecessor, as

(*a*) 1 Eliz. c. 19. 13 —— c. 10. 14 —— c. 11. 18 —— c. 11. 1 James, c. 8.
(*b*) 1 Inst. 44 a. (*c*) Thompson *v.* Trafford, Poph. 9.

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but with the assent of the parish or vestry, it binds his successors. The law of Massachusetts on this subject, though partly contained in statutes, is supposed to speak, in general, language of the common law of the country. See 15 Amer. Jur. 268, an article by the late Chief Justice Parsons. See also, Weston *v.* Hunt, 2 Mass. 500; Brown *v.* Porter, 10 Mass. 93; Brunswick *v.* Dunning, 7 Mass. 445; Shapleigh *v.* Pilsbury, 1 Greenl. 271; Dillingham *v.* Snow, 5 Mass. 547; Cargill *v.* Sewall, 1 Applet. 288; Emerson *v.* Wiley, 10 Pick. 317.

not being conformable to the proviso in the statute 32 Hen. VIII., because the surrender of the former lease was with a condition, that, if the then prebendary did not, within a week after, grant a new lease, the surrender should be void; whereby, as it was contended for the plaintiff, the old term was not absolutely gone; but the lessee reserved a power of setting it up again. (*a*)

The Court gave judgment for the defendant, this being within the intent of the statute; which was, that there should not be two leases standing out against the successor. Here, the new lease was made within the week; from thence it became an absolute surrender, both in deed and in law; the whole was out of the lessee, without further act to be done by him. In the proviso in the statute, there was the word *ended*, as well as *surrendered;* and could it be said that the first lease was not ended? This was no more than a reasonable caution in the first lessee, *to keep some hold of his old estate, till a new *64 title was made to him.

43. The stat. 18 Eliz. c. 11, s. 2, enacts that all leases to be made by any ecclesiastical or collegiate persons, or others, within the stat. 13 Eliz. c. 10, of any lands, &c., whereof any former lease for years is in being, and not to be expired, surrendered, or ended within three years next after the making of any such new lease, shall be void. And by the 3d section of 18 Eliz., all bonds and covenants for renewing any leases, contrary to the 13 Eliz. or this statute, are declared void. There are, however, some cases in which a bishop, with the consent of dean and chapter, may make a concurrent lease. (*b*)

44. IV. The *duration* of all leases made under these statutes, *must not exceed twenty-one years, or three lives;* but it may be for fewer years or lives. The intention of these statutes being only to abridge the power of making long and unreasonable leases, by reducing them to a determinate number of years or lives, which they should not exceed; but might be made as much under as the party pleased. (*c*)

45. If a bishop makes a lease for four lives, and one of them dies in the lifetime of the bishop, so that at his death there are but three lives in being, yet the lease will be void against his

(*a*) Wilson *v.* Carter, 2 Stra. 1201.
(*b*) 4 Bac. Ab. 64.
(*c*) 1 Inst. 44 b.

successor. For as it was originally void, no subsequent event, could make it good. (*a*)

46. If a lease be made to A, for the lives of B, C, and D, it is a good lease to one for the lives of three other persons; and a lease to three persons for three lives, is all one, within the intent of these statutes; for in both cases, three lives are the measure of the estate created, which is all the statutes require. (*b*)

47. It appears to be understood that a lease for sixty years, if three lives shall so long live, is good within the stat. 32 Hen. VIII., upon a principle which will be stated hereafter. (*c*)

48. By the statute 14 Eliz. c. 11, s. 17, it is enacted that the stat. 13 Eliz. c. 10, shall not extend to leases of houses belonging to any ecclesiastical persons, or bodies politic or corporate, situate in any city, borough, town corporate, or market town, or the suburbs thereof; but that all such houses may be granted and demised as they might have been before the making of that statute, except capital or dwelling houses. But
65* by the *19th section of this act, all leases for more than forty years are prohibited. It has, however, been held that covenants for renewing leases of houses in towns, are not prohibited by the 18 Eliz., which only restrains leases made against the stat. 13 Eliz. (*d*)

49. V. All leases made under these statutes, *must be of lands or tenements*, whereto *resort may be had*, *for the rent reserved by distress;* for otherwise, the heirs or successors of the lessors would be without any remedy for the recovery of the rent. These statutes do not therefore extend to advowsons, tithes, or other incorporeal hereditaments; but leases of tithes are now established by a particular statute. (*e*)

50. VI. The statute 32 Hen. VIII. *does not extend to any leases of manors or lands which have not most commonly been letten to farm, or occupied by the farmers thereof, by the space of twenty years next before such leases thereof made.* The intention of this clause was to prevent the persons enabled by the statute to demise, from making leases of their mansion houses and de-

(*a*) 10 Rep. 62 a.
(*b*) Baugh *v.* Haines, Cro. Jac. 76.
(*c*) 8 Rep. 69 b. Whitlock's case, *infra*, c. 16. 4 Bac. Ab. 69.
(*d*) Crane *v.* Taylor, Hob. 269.
(*e*) 1 Inst. 44 b. Tit. 28, c. 1.

mesnes, so as to bind their heirs or successors; as that practice would have produced a great decay of hospitality.

51. Various opinions have been held upon the construction of this clause. The better of them seems to be, that it consists of two parts in the disjunctive; if either of them be observed, it is sufficient to support the lease. The first is, "which have not most commonly been letten;" which is general. The other is, "or occupied by the farmers thereof by the space of twenty years." The most natural and genuine meaning of the clause is, that the lands to be leased must either be such as have been most commonly letten, that is, such as are not reputed part of the demesnes; or such as have been occupied by the farmers thereof by the space of twenty years. (*a*)

52. If lands have been let or occupied for eleven years, or more, at one or several times, within the twenty years next before a lease for twenty-one years, or three lives, it will be sufficient; and a demise by copy of court-roll will be considered as a sufficient letting within the statute. (*b*)

53. VII. The statute 32 Hen. VIII. further provides,—"That *upon every such lease there be reserved yearly*, during the same lease, due and payable to the lessors, their heirs and successors, to whom the same lands should come after the death of *the lessors, if no lease had been thereof made, and to *66 whom the reversion thereof should appertain, according to their estates and interests, *so much yearly farm or rent*, or more, as had been *most accustomably yielden* or paid for the manors, &c., so to be letten within twenty years next before such lease thereof made.

54. It has been a constant practice, ever since this statute was made, for bishops to take great fines upon the renewal of leases, of which the validity has never been questioned. As to tenants in tail, there can be no doubt but that they may also take fines upon the renewal of leases, provided the ancient rent be reserved. (*c*)

55. By stat. 18 Eliz. c. 6, it is required, that in all leases made by the colleges of Oxford, Cambridge, Winchester, and Eaton, one third of the old rent be reserved in corn.

(*a*) 4 Bac. Ab. tit. Leases, E.
(*b*) 4 Bac. Ab. tit. Leases, E. Baugh *v.* Haynes, Cro. Jac. 76.
(*c*) 1 Ves. & Bea. 245.

56. It was formerly doubted, whether ecclesiastical persons might make a lease of part of lands, which had been usually let for a certain rent, reserving a rent *pro ratâ*. But now, by the statute 39 & 40 Geo. III. c. 41, it is enacted, that where any part of the possessions of any ecclesiastical persons shall be demised by several leases, which was formerly demised by one; or where a part shall be demised for less than the ancient rent, and the residue shall be retained in the possession of the lessor; the several rents reserved on the several demises of the specific parts, shall be taken to be the ancient rents; with a proviso, that where the whole of such premises shall be demised in parts, the aggregate rents reserved shall not be less than the old accustomed rent; and so in proportion where a part shall be retained in possession by the lessor.

57. VIII. The last rule to be observed in respect to leases under this statute is, that they *must not be made without impeachment of waste.* For if, as the preamble speaks, long and unreasonable leases are the chief cause of dilapidations, and of the decay of hospitality, much more would they be so, if they were made dispunishable for waste. (*a*)

58. Parsons and vicars are expressly excepted out of the statute 32 Hen. VIII., so that they are not, as other sole corporations, enabled by that statute to make any leases to bind their successors, without the confirmation of the patron and ordinary, but remain as they did at common law. They are, however, 67* not *restrained by the act of 13 Eliz. from making leases for twenty-one years, or three lives; but then such leases must not only be confirmed by the patron and ordinary, but must also be made in conformity to the eight rules already mentioned, otherwise they will not bind the successors. And they are restained by the act of 13 Eliz. from making leases for any longer time, notwithstanding any confirmation, or conformity to the rules before mentioned. (*b*)

59. *Tenants for life* cannot make leases to continue longer than *their own lives.* Thus if A, lessee for the life of B, makes a lease for years, by deed indented, and after purchases the reversion in fee, and B dies, A shall avoid his own lease; for he may

(*a*) Dean and Chapter of Worcester's case, 6 Rep. 37.
(*b*) 4 Bac. Ab. tit. Leases, F. 1 Bing. 24.

confess and avoid the lease which took effect in point of interest, and determined by the death of B. (*a*)

60. Where the person in remainder or reversion joins with the tenant for life in making a lease; it is considered, during the life of the tenant for life, as his lease, and the confirmation of the remainder-man or reversioner. After the death of the tenant for life, it is considered as the lease of the remainder-man or reversioner; and the confirmation of the tenant for life. (*b*) † [1]

61. Where a *tenant by the curtesy* or *in dower*,[2] makes a lease for years, and dies, the lease is absolutely determined; for though their estates are *quodam modo* a continuance of the estates of the wife and husband, yet it is a continuance only for life; and having no power to contract for the inheritance, their leases or charges fall off with the estate out of which they were derived.

62. As *lessees for years* may assign or grant over their whole interest, so they may lease it for any fewer number of years than those for which they hold it; and such derivative lessee is compellable to pay rent and perform covenants, according to the terms contained in such derivative leases. (*c*) [3]

63. By the statute 4 Geo. II. c. 28, s. 6, reciting that leases for lives or years could not be renewed, without a surrender of all the underleases derived out of the same; it is enacted, that all future renewals of leases for lives or years, shall be deemed good and valid without the surrender of any derivative leases.

*64. It is said that a *guardian in socage*, having not only an authority, but an interest in the lands descended *68

(*a*) 1 Inst. 47 b. (Doe *v.* Archer, 1 B. & P. 531.)

(*b*) 1 Inst. 45 a. Treport's case, 6 Rep. 14. (Newdigate's case, Dyer, 234. Moor, 72. 1 Inst. 45 a.

(*c*) 4 Bac. Ab. tit. Leases, (I.) s. 3.

[† Tenants for life are frequently enabled by powers to make leases for long terms; of which an account will be given in Ch. XVII. of this title.—*Note to former edition.*]

[1] Where the tenant for life, with remainder to A, B, and C, in common in fee, made a lease for 21 years, which was confirmed by A and C; it was held a good lease, as against A and C; and that B could not impeach it, in a suit for partition in which he was co-plaintiff with A. Story *v.* Johnson, 2 Y. & C. 586.

[2] Until her dower is assigned, the widow has no estate which can be the subject of a lease. Croade *v.* Ingraham, 13 Pick. 33; *ante*, tit. 6, c. 3, § 1.

[3] Tenant from year to year, with power to renew his term upon giving six months' notice and preparing a fresh lease, may make a lease for 21 years. Mackay *v.* Mackreth, 2 Chitty, R. 461; 4 Doug. 213.

to his ward, may make leases for years in his own name; for he is *quasi dominus pro tempore.* But it has been determined that such leases become void, as soon as the ward attains his full age. (*a*)

65. A *testamentary guardian*, or one appointed pursuant to the statute 12 Cha. II. c. 24, being the same in office and interest as a guardian in socage, may also, (I presume,) make leases for years. (*b*) †

66. As *executors and administrators* may dispose absolutely of terms of years, vested in them in right of their testators or intestates; so may they lease the same for any fewer number of years; and the rents reserved on such leases will be assets in their hands. (*c*)

67. *Joint tenants, coparceners*, and *tenants in common* may either make leases of their undivided shares, or else may all join in a lease of the whole. (*d*)

68. One joint tenant, coparcener, or tenant in common, may also make a lease of his part to his companion; for this only gives the lessee a right to take the whole profits, when before he had but a right to a moiety of them; and he may contract with his companion for that purpose, as well as with a stranger. (*e*)

69. By the general custom of most manors, *copyholders* may make leases for one, and sometimes for three years; and they may, with the lord's license, make leases for any number of years; but though a lease be made by a copyholder, not warranted by the custom, without license of the lord, it is not absolutely void; for the lessee may maintain an ejectment against strangers. (*f*)

70. All *persons incapable of binding themselves* by any other

(*a*) Idem. s. 9. Roe *v.* Hodgson, 2 Wils. R. 129.
(*b*) Vaugh. 179.
(*c*) 4 Bac. Abr. Leases, (I.) 7.
(*d*) 1 Inst. 186 a. Tit. 18, c. 1.
(*e*) Idem. (Jurdain *v.* Steere, Cro. Jac. 88.)
(*f*) Haddon *v.* Arrowsmith, Cro. Eliz. 461.

[† By the statute 1 Will. 4, c. 65, infants or their guardians, by the direction of the Court of Chancery or the courts of equity, of peculiar jurisdictions, are empowered to make and receive surrenders of leaseholds, for the purpose of taking and granting renewed leases, §§ 12, 16; also to grant any leases under certain specified restrictions of any land of which the infant is seised in fee or in tail, or of any leaseholds in which he has an absolute interest, § 17.]

contract, such as persons of non-sane memory, &c., are of *course *incapable of making leases.*† *69

71. An infant cannot make a lease of his lands, unless it be evidently beneficial to him.[1] Where no rent is reserved, it has been held by some to be totally void, while others hold it to be only voidable. It appears, however, to be settled, that if an infant makes a lease for years, he cannot plead *non est factum*, but must avoid it by pleading the special matter of his infancy; which seems to favor the opinion of those who hold that the lease is not totally void. (*a*)

72. If an infant makes a lease reserving rent, it is *primâ facie* good; because it is presumed to be for his benefit. But it is voidable by the infant, when he comes of age; or by his heir if he dies under age. If a case of this kind were now to arise, the principle upon which its validity would depend, would be, whether it was beneficial or not to the infant. As Lord Mansfield has observed, that very prejudicial leases may be made, though a nominal rent be reserved; that there may be most beneficial considerations for a lease, though no rent be reserved; and that an infant may make a lease without rent, for the purpose of trying his title. (*b*)

73. *Married women*, being disabled by the common law from making any disposition of their real estates, during their coverture, cannot make leases; and therefore the stat. 32 Hen. VIII. has enabled their husbands to make leases for them.[2] ‡

74. [It should seem also that *trustees* having the legal estate

(*a*) 4 Bac. Abs. tit. Leases, B.

(*b*) 4 Bac. Ab. Tit. Leases B. (Ashfield *v.* Ashfield, W. Jones, 157. Baylis *v.* Dineley, 3 M. & S. 481. *Supra*, ch. 2, § 12, note.) 3 Burr. 1806.

[† But the *committees of lunatics may now make leases of the lunatic's lands, *69 under the direction of the Court of Chancery.] (See *ante*, § 29, note.)

[‡ By the 13th and 16th sections of 1 Will. 4, c. 65, above cited, married women, or any person in their behalf, are empowered by the direction of the courts of equity therein specified, to make and receive surrenders of leasehold property, for the purpose of taking and granting renewed leases.]

[1] This restriction is qualified and partially removed, in England, by the statute of 1 W. 4, c. 65.

[2] See *supra*, § 34, note; and ch. 2, § 24, note. [A lease by a married woman of land held by her in her own right, is void. Murray *v.* Emmons, 19 N. H. 483.]

may, in certain cases, where it is for the benefit of all parties, grant leases, without any express power vested in them.] (*a*)

75. There are many cases in which leases made by persons having only a particular estate in the lands, become *absolutely void* by the death of the lessors; and others where they are only *voidable* by the heirs, or persons in remainder or reversion.

76. This distinction is frequently material; for where a lease becomes absolutely void by the death of the lessor, no acceptance of rent, or any other act by the heir, or person in remain-
70* der or *reversion, will make it good; whereas, if a lease be voidable only, acceptance of rent will operate as a confirmation of it. (*b*)

77. All leases by tenants in tail not warranted by the statute 32 Hen. VIII. are voidable by the issue in tail.[1] But if the issue accept of rent or fealty after the death of their ancestor; or bring an action for the rent, or for waste, these acts will operate as a confirmation of the lease. (*c*)

78. With respect to leases made by tenants in tail conformable to the statute 32 Hen. VIII., though binding on the issue, they are void as against the persons in remainder and reversion; so that no acceptance of rent by them will operate as a confirmation. As to leases not conformable to the statute 32 Hen. VIII., they are of course void as to the remainder-man or reversioner. (*d*)

79. It has been stated that leases made by husband and wife, of the wife's land, though not conformable to the statute 32 Hen. VIII., are only voidable by the wife; therefore acceptance of rent by her, after her husband's death, will operate as a confirmation. And it is said that a lease by the husband alone, of his wife's land, is only voidable by the wife, not absolutely void. But some doubts are raised respecting this point by the late Mr. Serjeant Williams.(*e*) †

(*a*) Naylor *v.* Arnitt, 1 Russ. & M. 501. (*b*) 1 Inst. 211 b.
(*c*) 1 Inst. 45 b. (*d*) 1 Inst. 45 b.
(*e*) Ante, s. 85. Doe *v.* Weller, 7 Term R. 478. 2 Saund. 180, n, 9. 1 Doug. 52.

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[1] In most of the United States, estates tail are now unknown, or are made liable to be barred or encumbered by the deed of the tenant in tail, at his pleasure. See *ante*, Vol. I. tit. 2, ch. 2, § 44.

[† With respect to the cases where leases made by ecclesiastical persons are void, or only voidable, the student is referred to Bacon's Ab. tit. Leases, H.—*Note to former edition.*]

80. All leases made by tenants for life become absolutely void by their death; so that no acceptance of rent, or other act, by the persons entitled to the remainder or reversion, will operate as a confirmation of them.

81. A tenant for life made a lease for 21 years, and died before the expiration of the term. The remainder-man suffered the tenant to continue in possession four or five years, received the rent regularly during that time, then gave him notice to quit, and brought an ejectment. Lord Mansfield said: This was a void lease; but if it were voidable only, the acceptance of rent alone, unaccompanied with any other circumstance, was not a sufficient confirmation. It could not be a confirmation, unless done with a knowledge of the title at the time; or unless the remainder-man lay by, and suffered the tenant to lay out his money in improvements, in confidence of continuing tenant. But here it was a void lease; and in general a void lease was incapable of confirmation. (*a*)

*82. In a subsequent case, Lord Mansfield held, that a *71 lease which was void against a remainder-man, could not be set up by his acceptance of rent, and suffering the tenant to make improvements after his interest became vested in possession.

83. A tenant for life made a lease for 99 years, if two persons should so long live. The remainder-man received rent and heriots for several years from the lessee, who laid out considerable sums of money, after the death of the lessor, in improvements. Lord Mansfield said, there did not appear to have been any intention either to confirm the old lease, or to grant a new one; both parties had proceeded under a mistake, and had supposed the original lease to be good. Judgment was given that the lease was not confirmed. (*b*)

84. The Court of Chancery has however held, that where a remainder-man accepted rent, and suffered the tenant to make improvements, knowing the defect in the lease, he should execute a new lease to him.

85. A tenant for life made a lease of a house under a power. The lessee assigned over the premises to one Stiles, who rebuilt the house. After the death of the lessor, the remainder-man

(*a*) Jenkins *v.* Church, Cowp. 482.

(*a*) Doe *v.* Butcher, 1 Doug. 50. See, also, Doe *v.* Archer, 1 Bos. & Pul. 541.

accepted rent during six years, during which time the tenant built new offices. The remainder-man afterwards brought an ejectment against the tenant, and recovered the possession; the lease not being made pursuant to the power. The tenant filed a bill in Chancery for an injunction, to stay proceedings at law, and to be quieted in the possession of the house. (*a*)

Lord Hardwicke said, that where a remainder-man lies by, suffers the lessee or assignee to rebuild, and does not, by his answer, deny that he had notice of it; these circumstances together would bind him from afterwards controverting the lease. Decreed, that the defendant should execute a new lease to the plaintiff.

86. [Lord Coke lays down the following distinction: That where a lease is *made voidable only by the entry of the lessor for breach of a condition*, the lessor may waive the forfeiture, and consequent right of entry; but where the lease is *made ipso facto void by the breach*, there no subsequent recognition of the tenancy can set it up. The following case is in conformity with the latter branch of the above distinction.] (*b*)

72* *87. King Philip and Queen Mary demised the seat of the priory of Ravenstone, to T. Throckmorton, for 70 years, rendering rent, with a proviso, that upon non-payment within 40 days after the day it was due, *the lease should be void.* The rent was not paid within 40 days, in 9 Eliz., but afterwards the queen's receiver accepted it, made an acquittance, as if it had been paid at the day; and continued to receive it till 30 Eliz., when the queen granted the land. The non-payment of the rent in 9 Eliz. within the forty days, was found by office, upon which the new grantee entered. The case was argued several times in the Exchequer, and all the barons agreed: 1. That the lease became void immediately upon the non-payment of the rent, for the words were, that upon non-payment, the lease should cease and be void. So that the land was discharged of the contract, and the patentee was no longer a termor; nor, as Manwood said, a tenant at will, or at sufferance. 2. That the acceptance of rent afterwards, could not make a void lease good. (*c*)

A writ of error was brought before the Lord Keeper and the

(*a*) Stiles *v.* Cowper, 3 Atk. 692. (*b*) 1 Inst. 215 a. 3 Rep. 65 a.
(*c*) Finch *v.* Throckmorton, Cro. Eliz. 221. Poph. 53. Cro. Car. 511.

Lord Treasurer, when the judgment was affirmed, for this reason, that the proviso should be taken to be a limitation to determine the estate, and not a condition to undo the estate; which could not be defeated, in case of a condition, but by entry.

88. [The following authorities support the former branch of the above distinction; that if the lease is *merely voidable by the entry* of the lessor for breach of condition, there the lessor may waive the forfeiture; so that if he] *accepts rent after the breach of the condition*, he cannot take advantage of it, unless he was ignorant of such breach; in which case, acceptance of rent will not bar him.[1]

89. In Pennant's case, the lessee aliened without license, for which the lessor entered. The lessee said, that before the re-entry, the lessor accepted rent; to which the lessor replied, that before the receipt of rent, he had no notice of the alienation. It was adjudged for the plaintiff. (*a*)

90. But where the *lessor has notice of the breach* of a condition, and afterwards *accepts rent*, it will operate as a waiver of the forfeiture, and a confirmation of the lease.[2]

91. In a lease for twenty-one years, there was a covenant that the lessee should not underlet, assign, or transfer the premises, *without the assent of the lessor; with a power of *73
entry in case the lessee did not observe the covenant. The lessee underlet part of the premises, but with the knowledge of the lessor, who accepted rent accrued after such underletting. (*b*)

(*a*) Tit. 13, c. 1, s. 87. Roe *v.* Harrison, 2 Term R. 425.
(*b*) Goodright *v.* Davids, Cowp. 803.

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[1] Thus, where the lessee had committed waste, and the agent of the lessor, not knowing of the waste, continued to collect and receive the rents, it was held no waiver of the forfeiture. Jackson *v.* Brownson, 7 Johns. 227, 234, 235.

[2] See, accordingly, Chalker *v.* Chalker, 1 Conn. R. 79, 91; 7 Conn. R. 45, S. P. Though there have been a formal entry for the forfeiture, yet by the acceptance of rent afterwards, it is waived. Coon *v.* Brickett, 2 N. Hamp. 163. But to have this effect, the rent must have accrued subsequent to the forfeiture; for the acceptance of rent previously due, is no waiver. Jackson *v.* Allen, 3 Cowen, 220. And if, after the acceptance of rent, the original cause of forfeiture is continued, it is not a waiver. Ibid. If the forfeiture was incurred by the non-payment of rent, and the landlord distrains for it, this is a waiver, though the distress be insufficient. Jackson *v.* Sheldon, 5 Cowen, 448; see *ante*, tit. 13, ch. 2, § 25, note. [Tit. 27, ch. 1, § 56, note, (Vol. II. p. 85.)]

Lord Mansfield said, that to construe the acceptance of rent, due since the condition broken, a waiver of the forfeiture, was to construe it according to the intention of the parties. Upon the breach of the condition, the landlord had a right to enter. He had full notice of the breach, and did not take advantage of it, but accepted rent, subsequently accrued; that showed he meant the lease should continue. Cases of forfeiture were not favored at law; and where the forfeiture was once waived, the Court would not assist it.[1]

92. [But by modern authorities it is now settled, that, notwithstanding the *proviso* in the lease declares that it shall be *ipso facto void*, to all intents and purposes, the lease is nevertheless *not entirely vacated* by a breach of condition, *but only as against the lessee;* and it leaves the lessor the option of entering for the forfeiture, or not, at his pleasure. This modern version of the ancient rule is founded upon principles of justice; for, according to the old distinction, the lease would virtually be determinable at any time, at the will of the lessee, who, by not paying his rent, would be at liberty to insist that the lease was at an end.] (*a*)†

93. *All persons whatever*, though they be idiots, lunatics, infants, or married women, *may be lessees;* because a lease is

(*a*) Rede *v.* Farr, 6 Mau. & Selw. 121. Doe *v.* Bancks, 4 Bar. & Ald. 401. Arnsby *v.* Woodward, 6 Bar. & Cress. 519. Doe *v.* Woodbridge, 9 Bar. & Cress. 876. Doe *v.* Peck, 1 Bar. & Adol. 428. Roberts *v.* Davey, 1 Nev. & Man. 448.

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[1] The forfeiture arising from a breach of condition is not, in all cases, waived by mere passive and silent acquiescence; even though the party should refrain for years; but ordinarily, some positive act of waiver on his part is necessary. Thus, where a lease was forfeited by the exercise of an offensive trade on the premises, it was held that the landlord did not, by lying by and witnessing the act for six years, waive the orfeiture. Doe *v.* Allen, 3 Taunt. 78. And see Jackson *v.* Coyster, 1 Johns. Cas. 125; Gray *v.* Blanchard, 8 Pick. 284, 292. And an offer to accept payment, if made immediately, is no waiver of the forfeiture incurred by non-payment. Hutcheson *v.* McNutt, 1 Ham. 21.

[† Courts of law and equity will relieve against the forfeiture of the lease, by the tenant's omitting to pay rent, upon his satisfying the landlord the rent and any damage he may have sustained by the omission. Doe *v.* Roe, 4 Taunt. 883; Wadman *v.* Calcraft, 10 Ves. 67. The principle upon which such relief is granted is, that payment of money is a complete compensation, and will put the party in the same situation as he would have been in if no breach had occurred, but where this compensation cannot be made, relief will not be granted. Reynolds *v.* Pitt, 2 Price, 212; 19 Ves. 134; Rolfe *v.* Harris, 2 Price, 206; Green *v.* Bridges, 4 Sim. 96.] (See *ante*, tit. 13, ch. 2, § 29, and note (1).)

always presumed to be beneficial to the person who takes it. Where the lessees labor under any disabilities, at the time when the lease is made, they may, upon the removal of their disabilities, avoid such leases; but if they continue to occupy the things demised, after such removal of their disabilities, the lease becomes good.

CHAP VI.

EXCHANGE, PARTITION, RELEASE, AND CONFIRMATION.

SECT. 1. *Exchange.*
9. *Who may exchange.*
12. *Can only be between two Parties.*
14. *Partition.*
18. *Release.*
21. *How Releases enure.*
SECT. 22. *Mitter l'Estate.*
26. *Mitter le Droit.*
28. *Enlargement of Estate.*
35. *Extinguishment.*
38. *What may be released.*
40. *Confirmation.*

SECTION 1. An *exchange* is *a mutual grant of equal interests, the one in consideration of the other.* "As if (says Littleton) there be two men, and each of them is seised of one quantity of land in one county, and the one granteth his land to the other, in exchange for the land which the other hath; and, in like manner, the other granteth his land to the first grantor, in exchange for the land which the first grantor hath." (*a*)

2. There are *five circumstances* necessary to an exchange:— I. That the *estates* given be *equal.* II. That the *word, excambium,* "*exchange,*" be used; which cannot be supplied by any other word, or described by any circumlocution. III. That there be an *execution by entry* or *claim in the life of the parties.* IV. That if it be of things that *lie in grant,* it be *by deed.* V. That if the lands *lie in several counties,* it be by *deed indented;* or if the things *lie in grant,* though they be in one county. (*b*)

3. With respect to the *first* of these circumstances, it is only necessary that the *equality* be in the *quantity of the estates exchanged;* as an estate in fee for an estate in fee; an estate for life, for an estate for life; and not in the value, quality, or manner of the estate. Therefore an estate in joint tenancy
75* may * be exchanged for an estate in common. So lands

(*a*) Lit. s. 62.

(*b*) 1 Inst. 51 b.

may be exchanged for rents, commons, or any other inheritance concerning lands. And it is said in Bustead's case that an estate in reversion, expectant on an estate for life, may be given in exchange for land in possession; for in such case the parties are not deceived. (*a*)

4. An *estate tail* may be exchanged for an estate in fee, which will continue good till avoided by the issue in tail. A base fee may be exchanged for an estate in fee simple. A man may give an estate for the life of the donee, in exchange for an estate for another's life; for the estates are equal, both being estates of freehold. Roll says that an estate for three lives may be given in exchange for an estate for one life, for both are estates of freehold, and so equal; and it has been stated that an exchange between a tenant in tail after possibility of issue extinct, and a bare tenant for life, is good; for with respect to duration their estates were equal. (*b*)

5. With respect to the necessity of *the word "exchange,"* it is said by Perkins, and also in the Touchstone, that the word *permutatio*, or some other word of like effect, may supply it. But if A, by deed indented, give to B an acre of land in fee simple, or for life, and by the same deed B gives to A another acre of land in the same manner, this cannot enure as an exchange; and therefore if there be no livery of seisin it would be utterly void. (*c*)

6. An exchange must still be *executed by entry in the lifetime of the parties*, for as livery of seisin is not necessary, the parties have no freehold, in deed or in law, in them, till entry. Therefore, if both the parties die before the entry of either, the exchange is void; for the heir of one cannot enter and take it as a purchaser, because he is named only to take it by way of limitation of estate, in course of descent. But if one enters, and the other dies before entry, his heir may enter. (*d*)

7. Since the Statute of Frauds, every exchange *must be by deed in writing;* and where an exchange is made by lease and release containing mutual conveyances to the parties, as is now the general practice, no entry is necessary, for the Statute of Uses

(*a*) 1 Inst. 50 b. Lit. ss. 64, 65. 4 Rep. 122 b. Cro. Eliz. 902.
(*b*) 1 Inst. 50 b. 10 Vin. Ab. 131. Tit. 4, § 9. 1 Roll. Abr. 813, pl. 4.
(*c*) Perk. s. 53. Shep. Touch. 295. (*d*) Lit. s. 52. 1 Rep. 98 b.

executes the possession; and all incidents annexed to an exchange at common law will be preserved. (*a*)

76 * * 8. In every deed of exchange there is an *implied warranty*, arising from the word *excambium*, of which an account will be given in a subsequent chapter of this title.

9. *All persons who are capable of conveying their lands by any common assurance*, may of course exchange them with others. If an *infant* exchanges lands and enters on those taken in exchange, and continues to hold them after he attains his full age, the exchange becomes perfect; for it was not originally void, because the entry of the infant was equivalent to livery; as well as in respect to the recompense; but only voidable. (*b*)

10. If *husband and wife* exchange the *lands of the wife* for other lands, the wife may, after her husband's death, avoid the exchange, though she should join with her husband in a fine of the lands taken in exchange. But if the wife agrees to the exchange, after her husband's death, she can never avoid it. (*c*)

11. After the statutes 1 & 13 Eliz., no exchange of lands belonging to the church, by an ecclesiastic, bound the successor, though a full equivalent were given. But now it is otherwise. (*d*)

12. Littleton speaks of an exchange as of *a transaction between two persons;* and Mr. Hargrave says, it was held in a late case, that an exchange, in the strict legal sense of the word, could not be between three parties, the principal of it not being applicable to more than *two distinct contracting parties;* for want of the mutuality and reciprocity on which its operation so entirely depends. For, first, the consideration of an exchange, and the implied warranty to it, is the receiving something with warranty from the same person to whom something with warranty is given; but if there could be three distinct parties, each would give to one and receive from another. Secondly, the implied condition of reëntry is, that it may be made on him whose title fails: but if there could be three parties to an exchange, then each person would be liable to reëntry for the fault of another's title, as well as of his own. (*e*)

13. Although there cannot be more than two distinct parties

(*a*) *Ante*, c. 2.
(*b*) 1 Inst. 50 b, 51 b.
(*c*) Anon. 1 Leon, 285. Tit. 35, c. 10.
(*d*) Turther's case, Noy, 5. *Ante*, c. 2, s. 10.
(*e*) 1 Inst. 50 b, n. 1.

to an exchange, yet there may be more than two persons. Thus an exchange between two joint tenants, and two tenants in common, is good; for although four persons are named, yet they constitute only two distinct parties. The same observation applies to any number of persons, if so conjoined in the *mutuality of giving and receiving in exchange, as to *77 make only two distinct relative parties. (*a*)

14. It has been stated that joint tenants, coparceners, and tenants in common, may make a voluntary partition of their estates. The instrument to effect this is called *a deed of partition*, by which the lands are divided into distinct portions, and allotted to the several parties who take them in severalty. In the old deeds of partition, it was merely agreed that one should enjoy a particular part, and the other, another part, in severalty, which must have been executed by entry; but now it is usual for the several parties mutually to convey to each other the different estates which they are to take in severalty, under the partition. (*b*)

15. By the common law, coparceners, being compellable to make partition, might have done it by parol only; but joint tenants, and tenants in common must have done it by deed. The Statute of Frauds has abolished this distinction, and made a deed equally necessary in all cases. (*c*)

16. Every partition between *coparceners* has annexed to it a *warranty in law*. In all other deeds of partition, there is no implied warranty; but it is usual to insert mutual covenants for the title. (*d*)

17. It has been stated, that an agreement by the husbands of two joint tenants to make a partition, and a partition made under such an agreement, will not bind the inheritance of the wives. It has also been observed that an agreement to make a partition, will operate in equity as a severance of an estate in joint tenancy. (*e*)

18. By the common law, where a man had the actual possession and right of property in lands, he could only convey them by feoffment with livery of seisin. But as it frequently happened that the actual possession was in one person, and the right of possession, or right of property, in another; where the person

(*a*) 1 Inst. 51 a, n. 1. 3 Wils. 496.
(*b*) (*Ante*, tit. 18, 19, 20.)
(*c*) *Ante*, c. 3, s. 1.
(*d*) *Infra*, c. 25.
(*e*) Tit. 18, c. 2, s. 47. Idem, s. 45.

who had the right of possession, or right of property, was willing to convey those rights to the person who had the actual possession, it was done by a discharge of his right to the person in possession, which species of conveyance acquired the name of a *release.* A feoffment would, in such a case, have been useless; for it could not transfer the possession, as the person was in possession already. (*a*)

78 *• *19. A *release* is therefore *a conveyance of a right to a person in possession.*[1] Thus, it has been stated, that where a person was disseised, the disseisor acquired the possession; but the right of possession and property remained in the disseisee. Now if the disseisee agreed to transfer his rights to the disseisor, the proper mode of carrying such an agreement

(*a*) Gilb. Ten. 53.

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[1] A release to a person not in possession, if made for a valuable consideration, will be construed to be any lawful conveyance by which the estate might pass. Pray *v.* Pierce, 7 Mass. 381; Russell *v.* Coffin, 8 Pick. 143, 153; 1 Shep. Touchst. 82, Preston's ed.

A release to one wrongfully in possession, will operate to pass such right as the releasor had, though it were intended to have another effect. Thus, where a testator directed his executors, who were also his heirs, to sell his outlands for the payment of his debts, and professing to act as executors under this authority, they released to the disseisor certain lands of which he was disseised at the time of making his will, and down to the time of his death; it was held, that the release, though inoperative under the will, for want of seisin in the testator, was yet a sufficient release by way of *extinguishment* of the right of the executors, as heirs of the testator. Poor *v.* Robinson, 10 Mass. 131, 135, 136. And see Everenden *v.* Beaumont, 7 Mass. 76; Dexter *v.* Harris, 2 Mason, 531, 540. So, a release by the owner of land, to one who has already conveyed it to a third person, may operate as a *confirmation* of the title of the latter, though neither the releasor nor the releasee was in possession. Thus, where D. conveyed to A. his farm, excepting a certain close, and A. afterwards conveyed the farm to O., including the excepted close; and afterwards D. released the close to A.; it was held that the legal operation of the release was to O., to confirm his title, he alone being in possession. Oakes *v.* Marcy, 10 Pick. 195.

But when neither party was in possession, either actually or legally, at the time, no estate passes by the release. Porter *v.* Perkins, 5 Mass. 233; Warren *v.* Child, 11 Mass. 222; Mayo *v.* Libby, 12 Mass. 343.

In some of the United States, it is provided by statute, that the want of seisin or possession in the grantor shall not prevent the operation of his deed to pass the title and estate fully to the grantee. Hence the *release* of the owner, though disseised at the time, is held sufficient, in those States, to transfer the estate. See *Arkansas*, Rev. St. 1837, ch. 31, § 6; *Missouri*, Rev. St. 1845, ch. 32, § 4; *Illinois*, Rev. St. 1839, p. 149; *Michigan*, Rev. Stat. 1846, ch. 65, § 7. See, also, *Mississippi*, Rev. St. 1840, ch. 34, § 28, *semble;* Hall *v.* Ashley, 9 Ham. 96.

into execution was by a release, the disseisor having already the possession. (*a*)

20. The *operative words of a release* are, *remisisse, relaxasse, et quietum clamasse;* "*remise, release, and forever quit claim.*" Besides which, there are other words, such as *renuntiare, acquietare.* And where a lessor granted to his lessee for life that he should be discharged from the rent, this was held to amount to a release. Littleton says, a release of all demands is the best and strongest release. And Lord Coke observes, that the word "*demand*" is the strongest word in the law, except the word "*claim;*" that a release of all demands discharges all sorts of actions, rights, and titles, conditions before and after breach, executions, appeals, rents of all kinds, covenants, contracts, recognizances, statutes, &c. (*b*)

21. Releases of land, in respect to their operation, are divided into *four sorts.* I. Releases, that enure by way of *mitter l'estate.* II. Releases that enure by way of *mitter le droit.* III. Releases that enure by way of *enlargement;* and, IV. Releases that enure by way of *extinguishment.*

22. When two or more persons become seised of the same estate by a joint title, either by contract or descent, as joint tenants or coparceners, and one of them releases his right to the other, such release is said to enure by way of *mitter l'estate.* For where two several persons come in by the same feudal contract, one of them may discharge to the other, the benefit of such contract, by a release; because no notoriety is needful, for there was a sufficient notoriety in the prior feudal contract. Thus, two coparceners come into one entire feud, descending from their ancestor; they may therefore release privately to each other, because they take by the former descent, which established them in possession without notoriety. But since coparceners do also transmit distinct estates to their children, they may pass their estates by distinct feoffments. (*c*)

23. As to joint tenants, they can only pass their estates to one another by release; for they all come in by the *79 first feudal contract, and therefore a second feoffment cannot give any further title, or notoriety; because every person is

(*a*) Gilb. Ten. 53. Tit. 29, c. 1. (*b*) 1 Inst. 264 b. Lit. s. 508. 1 Inst. 291 b.
(*c*) Lit. s. 304. 1 Inst. 273 b. Gilb. Ten. 72.

supposed to be in by his elder title, which, in the case of joint tenants, is the original feoffment; so that a second feoffment would be useless. (*a*)

24. In consequence of the privity which must necessarily exist in releases that enure by way of *mitter l'estate, a fee will pass* by such a release, *without any words of limitation.* For the parties are not in by the release, but by the original feudal contract, which passed an inheritance; and the release only discharges the pretensions of one of them to the other. So that where one joint tenant or coparcener releases to the other, the releasee is in by the original conveyance; and such release is not considered as an alienation. (*b*)

25. *One tenant in common cannot release to his companion,* because they have distinct freeholds; but they must pass their estates by feoffment. For as they were created by different acts, and different liveries, they must also pass to each other by distinct liveries. (*c*)

26. Releases are said to enure by way of *mitter le droit,* where a person who has been disseised releases to the disseisor, or to his heir or feoffee, who being in possession, is therefore capable of taking a release of the right. And as in cases of this kind nothing but the bare right passes, the release is said to enure by way of *mitter le droit,* that is, transferring the right. (*d*)

27. *No words of limitation are necessary in a release of this kind;* for if a release of right be made to a person seised in fee, for a day or an hour, it will be as strong as if it were made to the releasee and his heirs forever. (*e*)

28. Releases enure by way of *enlargement of estate,* when the possession and inheritance are separated for a particular time, and he who has the reversion and inheritance releases all his right and interest in the lands to the person who has the particular estate. Such releases are said to enure by way of enlargement of estate, and to amount to a grant and attornment; because they transfer the legal estate to the releasee as effectually as a feoffment with livery. But to render this kind of release good, it is necessary that there should be a privity of
*80 estate *between the releasor and the releasee; and also

(*a*) Gilb. Ten. 72.
(*b*) 1 Inst. 273 b.
(*c*) Tit. 20. (Watk. on Conv 96.)
(*d*) Lit. s. 466. Gilb. Ten. 55.
(*e*) Lit. s. 467.

that the releasee should have such an estate as is capable of being enlarged. (*a*)

29. With respect to *privity of estate*, if a person makes a lease for years, the lessee is of course capable of taking a release from the lessor, because there is a privity between them. But in this case, the lessee must have entered on the lands before the execution of the release; for till entry, he has only an *interesse termini*, which is not capable of being enlarged. If, however, a man makes a lease for life, remainder for life, and the first lessee dies, a release to him in remainder is good, before he enters, to enlarge his estate. (*b*)

30. If A makes a lease to B for life, and the lessee makes a lease for years, and afterwards A releases to the lessee for years; it will not enlarge his estate, because there is no privity between A and the lessee for years. So, if a person makes a lease for twenty years, and the lessee makes a lease for ten years, if the first lessor releases to the second lessee, his release will be void for want of privity of estate. (*c*)

31. A release to a tenant at will operates so as to enlarge his estate, because there is a privity between him and the lessor. But a release to a tenant at sufferance is void, for want of privity. A release to a *cestui que use* by the feoffee to uses, was sufficient to enlarge his estate; because the *cestui que use* was tenant at will to the feoffees, and there was a privity between them. From which it may be concluded that a release to a *cestui que trust*, by the trustee, would now operate to enlarge the estate. A release to a person having an estate by statute merchant, statute staple, or *elegit*, will operate to enlarge their estates. (*d*)

32. If a feme covert be tenant for life, a release to her husband will be good; because there is both privity, and an estate in the husband, whereupon the release may enure; for by the marriage, the husband acquired a freehold estate in right of his wife. (*e*)

33. Lord Coke says, a release which enures by way of enlargement, cannot operate without a possession. This must be under-

(*a*) Lit. s. 465. 1 Inst. 272 b. (*b*) 1 Inst. 270 a. 273 a. Tit. 8, c. 1. 1 Inst. 270 b.
(*c*) 1 Inst. 273 a.
(*d*) Lit. s. 460. 1 Inst. 270 b. (Hamblet *v.* Francis, 4 Mass. 75, 79.) Lit. s. 462, &c. 1 Inst. 271. 1 Inst. 270 b. Tit. 14. (*e*) 1 Inst. 273 b.

stood to mean, not that an actual possession is necessary, but that the releasee has an estate actually vested in him at the time of the release, which is capable of being enlarged by such *81 *release. Thus, if a tenant for twenty years makes a lease to B for five years, and B enters, a release to the first lessee is good, for the possession of his lessee was his possession. So if a man makes a lease for years, remainder for years, and the first lessee enters, a release to the person in remainder for years is good to enlarge his estate. (*a*)

34. Releases which operate by *enlargement of estate*, require the *same technical words of limitation*, as feoffments or grants. Thus, if a lessor releases to his lessee for years all his right in the lands, this will only pass an estate for life. (*b*)

35. In some cases where the release cannot enure by way of *mitter le droit*, it will operate by way of *extinguishment*. Thus, if a lord releases his seigniory to the tenant, or if a person having a rent or common releases it to the terre-tenant, these releases are said to operate by way of extinguishment; because the tenant cannot have services or rent to receive of himself, nor can he take common in his own land. (*c*)

36. If a lease for years be made to commence presently, reserving rent, and before the lessee enters, the lessor releases to him all his right in the land; though this cannot enure to enlarge his estate, yet it will operate as an extinguishment of the rent. (*d*)

37. Littleton says, if a tenant for life lets the land over to another, for term of the life of the lessee, remainder over to another in fee, and the lessor, or owner of the inheritance, releases to the person to whom the tenant made the lease, he will be thereby forever barred, though no mention is made of his heirs; for at the time of the release the lessor had no reversion, but only a right to have the reversion. Lord Coke, in his comment on this passage, observes, that the release to the lessee does not enure by way of *mitter le droit*, for then should he have the whole right; but by way of extinguishment, in respect of him who made the release; and that it shall enure to him in remainder. (*e*)

(*a*) 1 Inst. 270 a, n. 3. (*b*) Lit. s. 465. (*c*) (*Supra*, § 19, note.)
(*d*) 1 Inst. 270 a. *Ante*, s. 29. (*e*) Lit. s. 470.

38. Not only estates in land, but *all interests, rights, and profits, arising out of, or annexed to, land, may be released.* It is, however, a rule of law, that no possibility, right, title, or thing in action, shall be granted or released *to a stranger*, for that would be the occasion of multiplying suits. Thus Lord Chief Baron Gilbert says, " A release of all a man's rights supposeth
*that he has a right, for he cannot transfer a right which *82
he has not; if he has nothing, nothing can pass by the conveyance, and it countenanced maintenance to transfer possibilities." Hence a son cannot release to his father's disseisor, in the lifetime of his father, because he has no right to the land then.[1] And in such a case the son might enter on the land against his own release. (*a*)

39. All rights, titles, and actions, *may*, however, *be released to the terre-tenant*, for securing his repose and quiet, and for avoiding suits. Therefore, *a right or title to an estate of freehold*, in *præsenti* or *futuro*, *may be released in five ways.* I. To the *tenant of the freehold* in fact, or in law, without any privity. II. To the *person in remainder.* III. To the person *entitled to the reversion*, without any privity. IV. To the person who has *a right only in respect of privity;* as if the tenant be disseised, the lord may release his services, in respect of the privity and right, without any estate. V. In respect to *privity only, without right;* as if tenant in tail makes a feoffment in fee, the donee, after the feoffment, has no right; yet in respect of the privity only, the donor may release to him the rent, and all services, saving fealty. But a bare authority cannot be released, nor a power collateral to the land. (*b*)

40. *A confirmation* is of a nature nearly similar to a release. Lord Coke defines it to be, "*A conveyance of an estate or right*

(*a*) Lampet's case, 10 Rep. 46. Gilb. Ten. 53. (Quarles *v.* Quarles, 4 Mass. 680, 688.) 1 Inst. 265 a. (Dart *v.* Dart, 7 Conn. R. 250. And see Jackson *v.* Wright, 14 Johns. 193. Jackson *v.* Hubble, 1 Cowen, 613. Jackson *v.* Winslow, 9 Cowen, 18. Jackson *v.* Peck, 4 Wend. 300. Porter *v.* Perkins, 5 Mass. 233.)

(*b*) 10 Rep. 48 a & b. (Blight *v.* Rochester, 7 Wheat. 535, 547. Fox *v.* Widgery, 4 Greenl. 214, 219.) *Infra*, c. 19.

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[1] *Supra*, ch. 4, § 39. Carleton *v.* Leighton, 3 Mer. 607. But a release by an heir apparent, of his estate in expectancy, with a *covenant* that neither he, nor those claiming under him, will ever claim any right in the same, it being *made fairly, and with the consent of the ancestor*, has been held a bar to the releasor's claim thereto, whether by descent or devise, after the death of the ancestor. Trull *v.* Eastman, 3 Met. 121.

in esse, whereby a voidable estate is made sure and unavoidable; or *where a particular estate is increased.*" (*a*)

41. The *first part* of this definition may be illustrated by the following case, put by Littleton. Where a person lets land to another, for term of his life, who lets the same to another for term of 40 years, by force of which he is in possession; if the lessor for life confirms the estate of the tenant for years, by deed, and afterwards the tenant for life dies, during the term; this deed will operate as a confirmation of the term for years. (*b*)

42. As to the *latter branch* of the definition; whenever a confirmation operates by way of increasing the estate, it is similar in every respect to a release that operates by way of enlargement, for there must be privity of estate, and proper words of limitation. Thus, in the case put by Littleton, it is said that, if the lessor for life had released to the tenant for years, in the lifetime of the tenant for life, the release would have been void,
83* for *want of privity between the lessor for life, and the tenant for years. (*c*)

43. The *proper technical words* for a confirmation are, "*ratify, approve, and confirm.*" But Littleton says that the word *dedi*, or the word *concessi*, has the same effect in substance, and shall enure to the same intent as the word *confirmavi.* Thus, if a disseisee conveys to the disseisor by the words *dedi* or *concessi*, it will operate as a confirmation. (*d*)

44. *No words of limitation are necessary in the case of a disseisin;* a confirmation by the disseisee to the disseisor, of his estate, would give him a fee-simple without the word *heirs;* it would be the same if the estate of the disseisor had been confirmed for a day or an hour only. (*e*)

45. If a disseisor makes a lease for 100 years, the disseisee may confirm parcel of those years, but then it must be by apt words; for he must not confirm the lease or demise, or the estate of the lessee, for then the addition, for parcel of the term, would be repugnant, when the whole was confirmed before; but the confirmation must be of the land, for part of the term. So may the confirmation be of part of the land; as if it be for 40 acres, he may confirm 20, &c. But an estate of freehold cannot be

(*a*) 1 Inst. 295 b. Gilb. Ten. 75.
(*b*) Lit. s. 516.
(*c*) Lit. s. 517.
(*d*) Lit. s. 581. 9 Rep. 142 a.
(*e*) Lit. ss. 519, 520.

confirmed for part of the estate, for that the estate is entire, and not several, as years are. (*a*)

46. Littleton says, if a man lets land to another for life, and after confirms his *estate* which he hath in the same land, to hold his *estate* to him and his heirs, this confirmation to his heirs is void; for his heirs cannot have his estate, which was but for term of his life. If he confirms his estate by these words, to have the same *land* to him and his heirs, this confirmation will give him an estate in fee-simple; because it applies to the land, and not to the estate in the land. (*b*)

47. A confirmation *does not strengthen a void estate. Confirmatio est nulla, ubi donum precedens est invalidum, et ubi donatio nulla est, nec valebit confirmatio.* For a confirmation may make a voidable or defeasible estate good, but cannot work upon an estate that is void in law. (*c*)

(*a*) 1 Inst. 297 a. (*b*) Lit. s. 524. (*c*) 1 Inst. 295 b.

CHAP. VII.

SURRENDER, ASSIGNMENT, AND DEFEASANCE.

SECT. 1. *Surrender.*
5. *Must be by Deed, or Note in writing.*
9. *Who may surrender.*
10. *What Estate necessary.*
SECT. 15. *Assignment.*
20. *Must be by Deed or Note in writing.*
21. *What may be assigned.*
25. *Defeasance.*

SECTION 1. A SURRENDER, *sursum redditio*, is of a nature directly opposite to a release; for as that operates by the greater estate descending upon the less, a surrender *is the falling of a less estate into a greater*. Lord Coke defines it to be a yielding up of an estate for life or years, to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown, by mutual agreement between them. (*a*)

2. A surrender immediately devests the estate out of the surrenderor, and vests it in the surrenderee; for this is a conveyance at common law, to the perfection of which no other act but the bare grant is necessary. And though it be true that every grant is a contract, and there must be *actus contra actum*, or a mutual consent, yet that consent is implied; for a gift imports a benefit, and an *assumpsit* to take a benefit may well be presumed. (*b*)

3. Though *an estate once surrendered* is *merged and destroyed, as between the surrenderor and surrenderee*, yet it is *not so as to strangers*, whose rights are preserved. Thus, if a tenant for life grants a rent charge, and after surrenders his estate, the rent charge shall continue. So, if a lessee for life makes a lease for years, rendering rent, and afterwards surrenders his estate, the lease for years shall continue, but the surrenderee will not have the rent upon the lease for years. (*c*)

(*a*) 1 Inst. 337 b. (4 Kent, Comm. 103.)
(*b*) Thompson *v.* Leach, 2 Salk. 618. Show. Parl. Ca. 150. *Ante*, c. 1, s. 29.
(*c*) Shep. Touch. 301.

[But where the original lease is forfeited by breach of a *condition, the underlease would also be defeated. In *85 the instance of surrender, it would be a manifest injustice if the original lessee could, by subsequent alienation of his term, destroy the interest of his underlessee, created by prior alienation. But in the case of forfeiture, the situation of the under lessee is materially different; for the original lessee, and all those claiming under him, can only take, subject to the conditions of the original lease; and in this respect the maxim applies *cessante statu primitivo, cessat atque derivativus.*]

4. The *technical and proper words* of this conveyance are "*surrender and yield up*," but *any form of words* by which the intention of the parties is sufficiently manifested, *will operate as a surrender.* Thus, if a lessee for years remise, release, discharge, and forever quitclaim his lessor, all his right, title, or interest in or to such lands, it will amount to a surrender. So, if a lessee for life leases to the lessor, for the life of the lessee, this is a surrender. (*a*)

5. Formerly a surrender of lands might have been made without deed or livery; but as to *incorporeal hereditaments*, whereof a particular estate could not commence without deed, they *could only be surrendered by deed.* An estate by the curtesy, or in dower, in an advowson, or rent, though it began without deed, could not be surrendered without deed. So, if a lease for life were made of lands, remainder for life, though the remainder began without deed, yet because remainders and reversions lie in grant, the remainder could not be surrendered without deed. (*b*)

6. A deed is still necessary to create a surrender, where it was formerly required. And now, by the *Statute of Frauds*, no surrender is valid unless it be *by deed or note in writing*, signed by the party so surrendering, or their agents thereunto lawfully authorized by writing, or by act and operation of law. (*c*) [1]

7. It was held, by Lord C. B. Gilbert, that, upon the true construction of this statute, a lease for years could not be surren-

(*a*) Perk. s. 607. Smith *v.* Mapleback, 1 Term R. 441. (*b*) 1 Inst. 388 a.
(*c*) *Ante*, c. 2, s. 58, &c. Farmer *v.* Rogers, 2 Wils. R. 27.

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[1] As to a surrender *by operation of law*, see Nicholls *v.* Atherstone, 11 Jur. 778; Livingston *v.* Potts, 16 Johns. 28; 2 Shep. Touchst. 300–302, Preston's ed.

dered by *cancelling the indenture*,[1] because the intent of the statute was to take away the manner they formerly had of transferring interests in lands by signs, symbols, and words only. (*a*)

8. Therefore, as livery of seisin, on a parol feoffment, was a sign of passing the freehold, before the statute, but is now
86* taken away *by the statute; so the cancelling of a lease was a sign of a surrender before the statute, but is now taken away, unless there be a writing under the hand of the party. The words, "by act and operation of law," were to be construed a surrender in law, by the taking a new lease, which being in writing, was of equal notoriety with a surrender in writing. (*b*)

9. *All persons capable of alienating lands*,[2] may surrender any particular interest therein.†

10. To make a surrender good, *the person who surrenders must*

(*a*) Magennis *v.* M'Cullogh, Gilb. R. 236. (Bolton *v.* Bp. of Carlisle, 2 H. Bl. 263. Doe *v.* Bingham, 4 B. & Ald. 672.)

(*b*) Roe *v.* Archb. of York, 6 East, 86. See also 2 Bar. & Ald. 119.

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[1] But see *supra*, ch. 1, § 15, note.

[2] Hence the *cestui que trust* is incapable of making a surrender. But a surrender by the trustee, to the beneficial owner, will often be presumed, after sufficient lapse of time, and where it would have been no breach of the trust. See the excellent treatise of Mr. Best, on Presumptions, p. 149–169, where this subject is fully discussed.

[† By the stat. 1 Will. 4, c. 65, s. 12, repealing the 29 Geo. 2, c. 31, it is enacted, that in all cases where any person under the age of 21 years, or a feme covert, is or shall become entitled to any lease or leases for life or years, it shall be lawful for such person under the age of 21 years, or for his or her guardian, or other person on his or her behalf, or for such feme covert, or any person on her behalf, to apply to the Court of Chancery in England, the courts of Equity of the counties palatine of Chester, Lancaster and Durham, or the courts of Great Session of the principality of Wales, respectively, as to land within their respective jurisdiction, by petition or motion in a summary way; and by the order and direction of the said courts respectively, such infant or feme covert, or his guardian, or any person appointed in the place of such infant or feme covert, by the said courts respectively, shall and may be enabled from time to time, by deed or deeds, to surrender such lease or leases, and accept and take in the place and for the benefit of such person under the age of 21 years, or feme covert, one or more new lease or leases of the premises comprised in such lease, surrendered by virtue of this act; for and during such number of lives, or for such term or terms of years, determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned or contained in the lease or leases so surrendered, at the making thereof respectively, or otherwise, as the said courts shall respectively direct.

By the 13th section of the same act, a similar provision is made, authorizing committees of lunatics, by direction of the Lord Chancellor, to surrender leases for the purpose of renewal.]

be in possession; and *the person to whom* the surrender is made, *must have a greater estate,* immediately in remainder or reversion, in which the estate surrendered may merge. (*a*)

*11. Thus, if a lessee for life or years be ousted by a stranger, and afterwards surrenders to his lessor, it will be void; because he had but a right at the time of the surrender. So, if a woman has a title to dower, and surrenders to the person against whom she ought to have dower, it is void for the same reason. It follows that a lease for years, to commence at a future day, cannot be surrendered; for there is nothing in the lessee, in possession, before the commencement of the lease, nor has the lessor a reversion before that time. (*b*) *87

12. To make a surrender good, there must be a privity of estate between the surrenderor and the surrenderee. Thus, if a tenant for thirty years makes a lease for ten years, and the lessor and lessee join in a surrender to the person in reversion in fee, the surrender is good for both the estates; yet the lessee for ten years could not surrender by himself for want of privity; but when the other joined with him, his surrender shall be taken in law to precede, and the surrender of the lessee for ten years, to follow; so that the same shall be good. (*c*)

13. An estate at will is not surrenderable, because it is at the will of both parties; and either party may determine his will, without the formality of a surrender. (*d*)

14. It was formerly doubted whether a lessee for years could surrender to a person who had the reversion only for years; but this point appears to have been settled by a determination in 35 Eliz., in which it was laid down—I. That if the term in reversion be greater than the term in possession, the lesser will merge in the greater; as 10 years may be surrendered and merge in 12 or 14 years. II. That though the reversion be for a less number of years, yet the surrender will be good, and the first term merged; as if one were lessee for 20 years, and the reversion expectant thereon was granted to another for a year, who granted it over to the lessee for 20 years, this would operate as a surrender of the 20 years' term, as if he had taken a new lease from his

(*a*) (Springstein *v.* Schermerhorn, 12 Johns. 357.)
(*b*) Perk. ss, 599, 600, 601. Doe *v.* Walker, 5 Bar. & Cres. 111. Tit. 8, c. 1, s. 10.
(*c*) Plowd. 541. (*d*) Cro. Eliz. 156. 12 Mod. 79.

lessor, for one year; for the reversionary interest coming to the possession drowns it; and the number of years is not material; for as he may surrender to him who hath the reversion in fee, so he may to him who hath the reversion for any less term. And, therefore, Popham held, that where lessee for 20 years makes a lease for 10 years, and the lessee for 10 years surrenders to his lessor, viz. the lessee for 20 years, this is good; and the
* 88 lessor * shall have so many of the years as were then to come of his former term of 20 years; that is, as it seems, so many years as were to come of his reversion shall now be changed into possession. And he held further, that if such lessee for 20 years had made such lease for 10 years, and then granted over the reversion for 10 years only, viz. no longer than the lease for ten years was to continue, and such lessee for ten years had attorned, then the grantee of the reversion should have the rent and services, and the grantor the residue of the 20 years. And that the lessee for 10 years might surrender to the grantee of the reversion for 10 years; and he thereby would have the possession for so many years as were then to come of his reversion. And if he had a less term in the reversion, than the lessee himself had in the possession, it should go to the benefit of the first termor for 20 years, who was his grantor: for the term in possession was quite gone, and drowned in the reversion, to the benefit of those who had the reversion thereupon, having regard to their estate in reversion, and not otherwise. (*a*)

15. *An assignment* is properly a transfer of some particular estate or interest in lands, but is usually applied to the transfer of a term for years. It differs from a derivative lease in this circumstance, that by such a lease the lessor conveys an interest less than his own, reserving to himself a reversion; whereas in an assignment, the assignor parts with his whole interest in the thing assigned, and puts the assignee in his place.

16. Where a person transfers all his term to another, reserving rent to himself; this is not an assignment but an underlease.

17. A having a term for years, whereof one year and three quarters was to come, agreed with B that he should have the premises for the remainder of the term, paying the same rent to

(*a*) Hughes *v.* Robotham, Cro. Eliz. 302. Poph. 31. 4 Bac. Abr. tit. Leases, S. 1, 2, p. 211. Stephens *v.* Bridges, Mad. & Geld. 66. *Supra*, tit. 8, c. 2, ss. 43, 44. *Infra*, tit. 39.

A as was reserved upon the original lease. It was held, that this was an underlease, and not an assignment. (*a*)

18. The *proper technical words of an assignment* are, "*assign, transfer, and set over.*" But the words *give, grant, bargain and sell*, or *any other words which show the intent* of the parties to make a complete transfer, will amount to an assignment.

19. *No consideration is necessary* to support an assignment *of a term for years;* for the tenure, attendance, and subjection *to forfeiture, as also the payment of the rent, if *89
there be any, is sufficient to vest the term in the assignee. (*b*)

20. Previous to the Statute of Frauds and Perjuries, all chattels real might have been assigned by parol only. But it is enacted by that statute that all *assignments* of leases or terms for years, shall be *by deed, or note in writing*, signed by the party assigning, or his agent, thereunto lawfully authorized by writing. (*c*)

21. *Every estate and interest in lands and tenements may be assigned;* as also every present and certain estate or interest in *incorporeal hereditaments*, such as rents, advowsons, &c., even though the interest be future, as a term for years to commence at a subsequent period, yet it may be assigned; for the interest is vested *in præsenti*, though only to take effect *in futuro*. (*d*)[1]

(*a*) Poultney *v.* Holmes, 1 Stra. 405. Palmer *v.* Edwards, 1 Doug. 187 a.
(*b*) 1 Mod. 263. (M'Clenahan *v.* Gwynn, 3 Munf. 556.)
(*c*) *Ante*, c. 2. Hodges *v.* Drakeford, 1 Bos. & Pul. N. R. 270.
(*d*) Perk. s. 91. 1 Inst. 46 b.

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[1] Rent yet to grow due is assignable; but rent in arrear is not. Demarest *v.* Willard, 8 Cowen, 206. A right of entry for condition broken, where the estate is terminated, *ipso facto*, by the breach, is assignable; but if the estate may exist after the breach, it is not. Gwynn *v.* Jones, 2 G. & J. 173. A bond with a penalty, conditioned to convey land to the obligee or his appointee, may be assigned after breach. Ensign *v.* Kellogg, 4 Pick. 1. The right of the occupant of land without valid title, to have the value of the betterments or lasting improvements made by him on the land, under the State laws, is assignable; and the assignment may be by parol, accompanied by an actual transfer of the possession to the purchaser; it not being an interest in the land itself. Lombard *v.* Ruggles, 9 Greenl. 62.

Whether a right to cut timber trees on the grantor's land is assignable, is a question that has been much discussed, and upon which the cases are apparently conflicting. Perhaps they may be reconciled, to some extent, by distinguishing between a mere license, which is personal in its nature, and a sale of the standing trees, to which the right to enter and remove them is incident, whether expressly given or not.

22. It should however, be observed, that *no right of entry or reëntry can be assigned;* so that if a person be disseised, and afterwards assign over his right to another, before he has entered on the disseisor, such assignment is void. Lord Coke says, this doctrine is founded on a principle of the common law, that nothing in action, entry, or reëntry, can be granted over.[1] For, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed. But *choses* in action are assignable in equity, as will be shown in the next chapter. (*a*)

23. A *naked power is not assignable;* where it is *coupled with an interest*, it *may be assigned;* as where a lease was made, with power to the lessor, his heirs and assigns, to cut down and sell trees; this power was held to be assignable. (*b*)

24. It is said by Mr. Fearne that an assignment of a contingent interest, even in lands of inheritance, for a valuable consideration, may be carried into execution by the Court of Chancery; upon the ground of its being such a contract or agreement as the Court may think fit to decree a specific performance of. (*c*)

25. A *defeasance* is a *collateral deed, made at the same time* with a feoffment or grant, *containing certain conditions, upon the*

(*a*) Lit. s. 347. 1 Inst. 214 a. (Greenby *v.* Wilcocks, 2 Johns. 1. 1 Cranch, 423–430.)
(*b*) Warren *v.* Arthur, 2 Mod. 317. (*c*) Fearne, Ex. Dev. 527.

The latter is assignable; but the former is not so, it being only a personal privilege. The real question is, what is the *subject* of the contract? If it is the trees only, as being in the contemplation of the parties, so much merchandise, without reference to the skill or judgment of the vendee in regard to their removal, or to any other considerations personal to himself, and without any further act of the vendor in regard to the delivery, the property may be deemed to have passed to the vendee, as personalty; and the grant of a right to enter and take the trees, thus sold, in prospect of immediate or speedy separation, may be assimilated to the delivery of the key of a warehouse, in which the goods sold are stored. In such case, the interest of the vendee is assignable. See Hob. 173; 1 Greenl. on Evid. § 271, and cases there cited; *ante*, tit. 1, § 45, note; Olmstead *v.* Niles, 7 N. Hamp. 522; Kent *v.* Kent, 18 Pick, 569; Pease *v.* Gibson, 6 Greenl. 81; Claflin *v.* Carpenter, 4 Met. 580; M'Coy *v.* Herbert, 9 Leigh, 548; Emerson *v.* Fisk, 6 Greenl. 200; Wood *v.* Manley, 11 Ad. & El. 34; Whitmarsh *v.* Walker, 1 Met. 313.

[1] To make an assignment valid at law, the subject of it must have an existence, actual or potential, at the time of the assignment. But Courts of Equity will support an assignment, not only of interests in action and contingency, but of things which have no present actual or potential existence, but rest in mere possibility only. Mitchell *v.* Winslow, 2 Story, R. 630, 639.

performance of which the estate created by such feoffment or grant *may be defeated.* It differs from a condition in this respect, that a condition is inserted in the deed by which the *estate is created. A defeasance is a separate deed exe- *90 cuted at the same time. (*a*)[1]

26. A defeasance, executed at the same time with a feoffment, was considered as a part of it, and therefore allowed; but *no subsequent secret revocation* of a solemn conveyance, *executed* by livery of seisin, was formerly permitted. As to things that were *merely executory*, or to be completed by matter subsequent, as rents, conditions, warranties, &c., they were *always liable to be avoided by defeasance made subsequent to the time of their creation.* (*b*)

27. A defeasance must be made *in eodem modo*, and by matter as high as the thing to be defeated; so that if the one be by deed, the other must be also: and where the defeasance recites the deed which it is meant to defeat, as it always does, it must recite it truly. (*c*)

28. [Defeasances are of *two kinds*—those which relate to *estates of freehold* and inheritance, and those which affect *chattels* and *executory interests*, such as rents, annuities, conditions, warranties, covenants and the like. Defeasances of the former class must, as above stated, be made at the time of the creation of the estates to be thereby defeated. But the latter kind may be made at any time after, so they be *eodem modo*, and with the consent of all those who were parties to the creation of the chattels or

(*a*) (2 Prest. Conv. 166, 199, 208. Shep. Touchst. ch. 22, p. 396-398. Preston's ed. 4 Kent, Comm. 141, 142.)

(*b*) 1 Inst. 236 b, 237 a.

(*c*) Shep. Touch. 397.

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[1] It is not necessary that the two deeds bear the *same date*; it is sufficient if both be *delivered* at the same time. If the right or title, and the power to defeat it, are created by one transaction, *uno flatu*, it is a defeasance; and the essence or vital part of the transaction is the *delivery* of the deeds. Harrison *v.* Phillips' Academy, 12 Mass. 456; Newhall *v.* Burt, 7 Pick. 157; Bennock *v.* Whipple, 3 Fairf. 346; Erskine *v.* Townsend, 2 Mass. 493; Flagg *v.* Mann, 14 Pick. 467, 479; *ante*, tit. 15, ch. 1, § 12, note.

A writing not under seal is no defeasance at law; but it is otherwise in equity. Kelleran *v.* Brown, 4 Mass. 433; 2 Story, Eq. Jur. § 1018; Cutler *v.* Dickenson, 8 Pick. 386; 4 Kent, Comm. 142. If the defeasance is written on the back of the deed, but executed as a separate instrument, the party claiming it to be a defeasance, will be required to prove that the indorsement was upon the deed at the time of its execution. Emerson *v.* Murray, 4 N. Hamp. 171. [See, also, Baldwin *v.* Jenkins, 23 Miss. (1 Cushm.) 206.]

other interests to be defeated or annulled, or by those who represent them. (*a*)

29. The learning of defeasance is now not unfrequently resorted to, in order to obviate the consequences of giving a license to assign to a lessee whose lease contains a clause against assigning without the lessor's consent; for, according to Dumpor's case, a license once given entirely discharges the condition. (*b*)

(*a*) Shep. Touchst. 396.

(*b*) *Supra*, tit. 18, c. 1, s. 38 n. 4 Rep. 119. 2 Prest. Conv. 199. Append. 7 ed. 8.

CHAP. VIII.

BOND AND RECOGNIZANCE.

SECT. 1. *Bond.*
7. *Its Effects.*
8. *As to the Obligor.*
10. *As to his Heir.*
11. n. *As to a Devisee.*
12. *Where the Remedy may exceed the Penalty.*
SECT. 14. *Recognizance.*
16. *Effect of.*
20. *Bonds and Recognizances are assignable.*
23. *Defeasance of a Bond, &c.*

SECTION 1. A bond or obligation is *a deed poll, whereby the obligor binds or obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to the obligee, on a particular day.* If this be all, the bond is called a simple one, *simplex obligatio.* But there is generally a condition added, that if the obligor does some act, the obligation shall be void, or else shall remain in full force; as payment of rent, performance of covenants in a certain deed, or repayment of a principal sum of money, borrowed of the obligee, with interest; which principal sum is usually one half of the penal sum specified in the bond.

2. There are only *three things essentially necessary* to a bond; namely, *writing*, *sealing*, and *delivery.* For as to signing, that circumstance was clearly not necessary in former times; and the Statute of Frauds does not extend to bonds, for no estate or interest in lands is immediately created by them. (*a*)

3. No particular form of words is required to constitute a bond; *any words which show the intention of the party to bind himself, will be sufficient;* for such obligation is only in the nature of a contract, or a security for the performance of a contract, which is construed according to the intention of the parties. If there be an omission of the usual conclusion of a condition, namely, that then the obligation shall be void; yet the condi-

(*a*) *Ante*, c. 2, s. 62. 1 Salk. 462.

92 * tion * is good; and it is a good defeasance of the bond. For insensible and repugnant words shall be rejected. (*a*)

4. It has also been held, that *any words by which the intention of the parties can be discovered, are sufficient to make a condition* † *of a bond.* For if the words, though improper, should be construed void, and not a condition, then the obligation would be single, and of force against the obligor, though he had performed the condition of it, according to the intention of the parties. And the condition, being for the benefit of the obligor, shall be construed favorably. (*b*)

5. Mr. Serjeant Williams, in his note on this case, says,—"With respect to *impossible or void conditions*, the following *distinction* has been taken; that where the condition is underwritten or indorsed, *that* is only void, and the obligation is single. But where the condition is part of the lien itself, and incorporated therewith (as in a recognizance by bail,) if the condition be impossible, the obligation is void." (*c*)

6. Where the *condition* of a bond is *entire*, and the whole is against law, it is void. But where the condition consists of several *different parts*, some of which are lawful, and others not, it is good for so much as is lawful, and void for the rest. If a bond is given with a condition to do a thing against an act of parliament, and also to pay a just debt, the whole bond is void, because the letter of the statute makes it void, and it is a strict law. (*d*) [1]

(*a*) Cro. Eliz. 561, 729, 886. 1 Saund. R. 66, n. 1.
(*b*) Butler *v.* Wigge, 1 Saund. 66. Co. Lit. 206.
(*c*) Pullerton *v.* Agnew, 1 Salk. 172. (*d*) Idem.

[† The condition of the bond is an agreement within the meaning of the statutes 8 & 9 Will. 3, c. 11, s. 2; 2 Geo. 2, c. 22; 8 Ib. c. 24; 2 Burr. 826. Per Lord Mansfield, who observes, "the condition of a bond is an agreement in writing; and people have frequently gone into courts of equity upon conditions of bonds, as being agreements in writing, to have specific performance of them."]

[1] The notion that a bond, containing, among other things, a condition to do something contrary to an express statute, was therefore void *in toto*, arose from a misconception of what fell from the Court in Norton *v.* Simmes, Hob. 14. The words were these: "And difference was taken between a bond made void by statute, and by common law; for upon *the statute of* 23 *Hen.* 6, if a sheriff will take a bond for a point against *that law*, and also for a due debt, the whole bond is void; for the letter of *the* statute *is so;* for a statute is a strict law." This language was quoted in Maleverer *v.* Redshaw, 1 Mod. 35, by *Twisden*, J., with his characterestic energy of expression, in a

7. This security is called a *specialty*, the *debt* being therein particularly *specified in writing;* and the party's seal, acknowl-

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question arising upon the same statute. "I have heard," said he, "my Lord Hobart say upon this occasion, that because *the statute* would make sure work, and not leave it to exposition what bonds should be taken, therefore it was added, that bonds taken in any other form *should be void.* For, said he, *the* statute is like a tyrant, where he comes he makes all void; but the common law is like a nursing father; makes void only that part where the fault is, and preserves the rest." The Court, in both cases, were speaking, not of statutes in general, but of the statute of 23 Hen. 6, c. 10, alone; and this statute, enacted against bonds to the sheriff for ease and favor, prescribes in strict terms what securities the sheriff may take, and then declares, that "if any of the said sheriffs or other officers or ministers aforesaid take *any* obligation, in other form, by color of their offices, that it *shall be void.*" The error arose from taking, as a general proposition, what was said only in reference to a particular statute, and is true of others only where it is expressly enacted that the instrument shall be totally void. This error seems to have been sanctioned by Ld. Ch. Just. Wilmot, in Collins *v.* Blantern, 2 Wils. 351, and is adopted in terms by Mr. Serjeant Williams, in his note (1) to Butler *v.* Wigge, 1 Saund. 66, and by Mr. Cruise, in the text, as well as by others. But it has been contradicted in several cases, in England; and as a point of American law it is put at rest by a decision directly upon the point, in The United States *v.* Bradley, 10 Peters, 343; in which Mr. Justice Story, in delivering the opinion of the Court, said as follows:—

"That bonds and other deeds may, in many cases, be good in part, and void for the residue, where the residue is founded in illegality, but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period. Thus, in Pigot's case, 11 Co. 27 b, it was said, that it was unanimously agreed in 14 Hen. 8, 25, 26, that if some of the covenants of an indenture, or of the conditions indorsed upon a bond are against law, and some are good and lawful, that in this case the covenants or conditions which are against law, are void *ab initio;* and the others stand good. And, notwithstanding the decision in Lee *v.* Coleshill, Cro. Eliz. 529, which, however, is distinguishable, being founded on a statute, the doctrine has been maintained, and is settled law at the present day in all cases where the different covenants or conditions are severable, and independent of each other, and do not import *malum in se;* as will abundantly appear from the case of Newman *v.* Newman, 4 M. & Selw. 66, and the other cases hereafter stated; and many more might be added.

"But it has been urged, at the bar, that this doctrine is applicable only to cases where the case stands wholly at common law, and not where the illegality arises under a statute; and this distinction derives countenance from what was said in Norton *v.* Simmes, Hob. 14, where the distinction was taken between a bond made void by statute, and by common law; for (it was there said) upon the statute of 23 Hen. 6, ch. 9, 'if a sheriff will take a bond for a point against that law, and also for a debt due, the whole bond is void; for the letter of the statute is so. For a statute is strict law; but the common law doth decide according to common reason; and having made that void which is against law, lets the rest stand, as in 14 Hen. 8, 15.'

"In the case of Maleverer *v.* Redshaw, 1 Mod. Rep. 35, which was debt, upon a bail bond, Mr. Justice Twisden said, he had heard Lord Hobart say, 'that the statute, i. e. 23 Hen. 6, ch. 9, is like a tyrant; when he comes, he makes all void. But the common law is like a nursing father, makes void only that part where the fault is, and preserves the rest.' But Mr. Justice Twisden added, that Lord Hobart put this doctrine upon

edging the debt or duty, and confirming the contract, renders it a security of a higher nature than those entered into without the

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the ground that the statute of 23 Hen. 6, ch. 9, had expressly declared that if any of the sheriffs, &c., should take any obligation in any other form, by color of their office, that then it should be void. (See 2 Saund. Rep. 55; Ib. 59, Williams's note (3).) The case in Hobart's Reports, was put by the Court expressly upon this distinction. And it was well remarked by Mr. Justice Lawrence, in Kerrison *v.* Cole, 8 East's Rep. 236, that this case is equally reconcilable with the general principle; for sheriff's bonds are only authorized to be taken with a certain condition; and, therefore, if they are taken with any other condition, they are void *in toto*, and cannot stand good in part only. But that does not apply to different and independent covenants and conditions, in the same instrument; which may be good in part, and bad in part; and so it was held by the whole Court in that case; and notwithstanding the instrument, (a bill of sale and mortgage of a ship,) was by statute declared to be utterly null and void, to all intents and purposes; yet it was held, that a covenant in the same instrument, to repay the money lent, was good as a personal covenant. The same doctrine was held in Wigg *v.* Shuttleworth, 13 East's Rep. 87; How *v.* Synge, 15 East's Rep. 440; Mouse *v.* Leake, 8 Term Rep. 411; Greenwood *v.* The Bishop of London, 5 Taunt. Rep. 727; S. C. 1 Marsh. Rep. 292. In this last case, the Court took notice of the true line of distinction between the cases, viz.: between those cases, where the statute had declared the instrument taken in any other form, than that prescribed by the statute, to be utterly void; and those cases, where it had declared the instrument void only as to the illegal act, grant, or conveyance. It was the case of a conveyance affected with simony, so far as the next presentation was concerned; but conveying the advowson in fee. On this occasion the Court said, 'there can be no doubt, that the conveyance of an advowson in fee, which is of itself legal, if it be made for the purpose of carrying a simoniacal contract into execution, is void as to so much as goes to effect that purpose; and if the sound part cannot be separated from the corrupt, it is altogether void. It is not, as in the case of usury, and some others, avoided by the positive and inflexible enactment of the statute, but left to the operation of the common law, which will reject the illegal part, and leave the rest untouched, if they can be fairly separated.' Here, the doctrine was applied directly to the very case of a statute prohibition.

"But the case of Doe dem. Thompson *v.* Pitcher, (6 Taunt. R. 359; S. C. 2 Marsh. R. 61,) contains a still more full and exact statement of the doctrine. It was a case supposed to be affected by the prohibitions of the Statute of Charitable Uses, 9 Geo. 2, ch. 36. Lord Chief Justice Gibbs, in delivering the opinion of the Court, addressing himself to the argument, that if the deed was void as to part, it must be void as to the whole, said: 'If the objection had been derived from the common law, it is admitted that would not be the consequence. But it is urged that the statute makes the whole deed void. As the counsel for the plaintiff puts it, (instead of these words in 2 Marshall's Reports, p. 69, the words are, 'The truth is' there is no difference, &c.,) there is no difference between a transaction void at common law, and void by statute. If an act be prohibited, the construction to be put on a deed conveying property illegally is, that the clause which so conveys it is void equally, whether it be by statute or common law. But it may happen that the statute goes further, and says that the whole deed shall be void to all intents and purposes; and when that is so, the Court must so pronounce, because the legislature has so enacted; and not because the transaction prohibited is illegal. I cannot find in this act any words which make the entire deed void,

solemnity of a seal. Hence bond debts are preferred to those due on simple contract.

8. When the condition of a bond is not performed, it becomes forfeited and absolute in law; and is a charge on the personal estate and chattels real of the obligor, but not on his freehold lands; therefore any settlement or disposition which he makes *in his lifetime of his freehold estates, whether *93 voluntary or not, will be good against bond creditors. For a bond being no lien whatever upon lands, in the hands of the obligor, much less can it be so, when those lands are disposed of to a stranger. (*a*)

9. A purchaser for a valuable consideration is not affected by notice of a bond debt; for he is to look no further than his title; and the bond debt is no part of the title, till it is placed on the land by a judgment. (*b*)

(*a*) Treat. of Eq. B. 1, c. 4, s. 14.
(*b*) Gilb. Lex. Præt. 293. Treat. of Eq. B. 1, c. 4, s. 12.

&c. I think this grant of that interest in land, which by the terms of the grant is to be applied to a charitable use, is void; and that the deed, so far as it passes other lands not to a charitable use, is good.' Such is the clear result of the English authorities.

"In this court, a similar doctrine has been constantly maintained. It was acted upon in the case of The Postmaster-General *v.* Early, (12 Wheaton's Rep. 136). It was taken for granted, in Smith *v.* The United States (5 Peter's Rep. 293); where the objection, indeed, was not taken; but the bond was not in exact conformity to the statute (act of the 16th of March, 1802, ch. 9, sect. 16,) under which it was given by a paymaster. It was also directly before the Court, in Farrer and Brown *v.* The United States (5 Peters's Rep. 373); where the bond, taken under the act of the 7th of May, 1822, sect. 1, wholly omitted one of the clauses required by the statute to be inserted in the condition. The Court there entertained no doubt as to the validity of the bond, and only expressed a doubt whether a breach, which was within the direct terms of the omitted clause, and yet which fell within the general words of the inserted clause, could be assigned as a good breach under the latter. But if the bond, being a statute bond, was totally void, because the condition did not conform to all the requirements of the act, it would have been wholly useless to have discussed the other questions arising in the cause. Upon the whole, upon this point we are of opinion that there is no solid distinction in cases of this sort between bonds and other deeds, containing conditions, covenants, or grants, not *malum in se,* but illegal at the common law; and those containing conditions, covenants, or grants, illegal by the express prohibitions of statutes. In each case the bonds or other deeds are void as to such conditions, covenants, or grants, which are illegal; and are good as to all others which are legal and unexceptionable in their purport. The only exception is, when the statute has not confined its prohibitions to the illegal conditions, covenants, or grants; but has expressly, or by necessary implication, avoided the whole instrument to all intents and purposes." 10 Peters, 360–363; see also Norton *v.* Simmes, Hob. 14, note by Mr. Williams.

10. If the obligor *binds himself and his heirs* in a bond, it will then be *a lien* on all the freehold estates whereof he dies seised, and will bind his heirs, who, in default of personal assets, will be bound to discharge it out of the real assets of the obligor. So that a bond, [wherein the heirs are bound,] is a collateral, though not a direct charge on lands. (*a*)[1]

11. It has been stated that reversions, after estates for years, are immediate assets, and reversions, after estates for life, are *quasi* assets; in both which cases they are liable to the payment of bond debts; that reversions expectant on estates tail are assets when they fall into possession; in which case they are liable to the bond debts of the person who was the original donee of the reversion, and to whom the person claiming such reversion must make himself heir; but not to the bond debts of any intermediate heirs, who were entitled to such reversion. (*b*) †

94* *12. When a bond was forfeited, *the penalty* became the *legal debt;* nor was any relief given against it, but by a court of equity; where the obligee is only allowed to recover his principal, interest, and costs. But now, by the statute 4 Ann.

(*a*) Tit. 1, § 56–58 and notes. (*b*) Tit. 17, § 21–30.

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[1] As to the liability of an heir or devisee, at the common law, on the bond of the ancestor or devisor, see Hurlstone on Bonds, Ch. VI. p. 101–106.

As to the liability of the heir or devisee, in the United States, and the mode of reaching the lands of a deceased debtor, in the hands of his heir or devisee, see *ante*, tit. 1, § 58, note. Here, the liability of the heir on the bond of his ancestor, whether he be named or not, is merely contingent and eventual; namely, where there is no remedy against the executor or administrator. And for this purpose, it is not necessary that the heirs be mentioned in the bond, the remedy being substantially against the assets in their hands in trust for the creditors. Webber *v.* Webber, 6 Greenl. 127; Royce *v.* Burrell, 12 Mass. 395; Howes *v.* Bigelow, 13 Mass. 384. Lands in another State are not deemed assets, chargeable to the heir. Austin *v.* Gage, 9 Mass. 395.

[† By the statute 3 William and Mary, c. 14, the heir of a person indebted by bond was answerable, though he aliened the estate. And by the same statute, ss. 2, 3, all devises of lands were declared to be fraudulent and void, as against bond creditors; an estate in reversion was within this act; and a devise of such a reversion by the heir of the obligor [was also held to be] within this statute; in which case the lands devised were liable. Tit. 38, c. 1; Tit. 1, § 56, n.; Kynaston *v.* Clarke, tit. 17, s. 31.

[The statute 1 Will. 4, c. 47, repeals the above statute, and substitutes amended enactments, whereby the devisee is now placed in the same situation as the heir; and it extends the creditor's remedies against the heir and devisee, in respect of debts due on covenants or contracts under seal, although they be not for sums certain in amount; it having been decided that the statute of 3 Will. and Mary, c. 14, applied only to

c. 16, s. 12, payment of the principal, interest, and costs, is good at law.

13. Although at law there can in general be *no remedy beyond the penalty*, because in that the obligee seems to have taken his security; yet as it is on the foundation of doing equal justice to both parties that equity proceeds, it will, on any application for a favor from the obligor, compel him to pay the principal, interests, and costs, though exceeding the penalty. (*a*) † [1]

*14. It has been stated, that a *recognizance* is a bond acknowledged in the Court of King's Bench, or Common Pleas, or before the mayor of the staple at Westminster, *95

(*a*) Wilde *v.* Clarkson, 6 Term R. 303. 3 Bro. C. C. 492, 525.

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bond debts or covenants for the payment of sums certain, and not to damages for breaches of covenants or contracts under seal. Wilson *v.* Knubly, 7 East, 128.]

[† In Ingleby *v.* Swift, 10 Bing. 84, a bond was given for the payment of rent and the performance of covenants in the penalty of £1000. The condition recited that it had been agreed that the defendant should enter into a bond with two sufficient sureties in the penalty of £500. The rent being in arrear beyond the £500, an action (of debt) was brought upon the bond, and it was contended on behalf of the defendant, (the obligor,) that the penal sum should be reduced by the recital, and that the case fell within the stat. 8 and 9 Will. III. c. 11. But the Court of C. B. decided that the penalty could not be reduced by the recital of an agreement to execute the bond in another penalty. See, as to indorsements on bond, 1 Cro. & Mee. 410.]

[1] The rule, that interest is not recoverable at law, beyond the penalty of the bond, seems now well settled in England; though in some older cases it has been held otherwise. Branscome *v.* Scarborough, 6 Ad. & El. 13, N. S.; 8 Jur. 688, S. C. And see Crafts *v.* Wilkinson, 4 Ad. & El. 74, N. S. Nor will it be allowed in Equity, unless under special circumstances. Clark *v.* Seton, 6 Ves. 411; Walters *v.* Meredith, 3 Y. & C. 264; Lloyd *v.* Hatchett, 2 Anstr. 525; Mackworth *v.* Thomas, 5 Ves. 329; Clarke *v.* Ld. Abington, 17 Ves. 106.

In some of the United States, the same rule has been administered. Armstrong *v.* State, 7 Blackf. 81; Warden *v.* Nielson, 1 Murphy, 275; Rayburn *v.* Dean, 8 Mis. 104. But the weight of authority is in favor of allowing interest beyond the penalty; to be computed, either from the first breach; Carter *v.* Carter, 4 Day, 30; Perit *v.* Wallis, 2 Dal. 252; or, from the time of demand of the debt; The State *v.* Wayman, 2 G. & J. 254; or, at least, from the commencement of the action. Warner *v.* Thurlo, 15 Mass. 154. See Harris *v.* Clap. 1 Mass. 308; Pitts *v.* Tilden, 2 Mass. 118; Lewis *v.* Dwight, 10 Conn. 95; The People *v.* Gaine, 1 Johns. 343; Potter *v.* Webb, 6 Greenl. 14; United States *v.* Arnold, 1 Gal. 348, 360, affirmed 9 Cranch, 104; Bank of U. S. *v.* M'Gill, 1 Paine, 659, affirmed 12 Wheat. 511.

But where the bond contains on its face the evidence of an agreement collateral to the penalty, an action of covenant may be brought upon the agreement, and judgment recovered for the actual debt or damages, without regard to the penalty. Harrison *v.* Cheston, 1 Rol. Abr. 592, cited 1 Com. Dig. 159, Action, M. 4; 3 Com. Dig. 258, Covenant, A. 2, cites Ca. Ch. 204.

or the recorder of London; and the several circumstances required to render it a lien upon lands, are there mentioned. It is, in most respects, similar to a bond; the difference being chiefly, that a bond is the creation of a new debt, whereas a recognizance is the acknowledgment, upon record, of a former debt. (*a*)[1]

15. The *form of a recognizance* is thus:—"That A. B. doth acknowledge to owe to our sovereign lord the king, or to C. D., the sum of £100," with condition to be void on performance of the thing stipulated. This being either certified to, or taken by the officer of some court, it is witnessed only by that officer, not by the party's seal. So that it is not, in strict propriety, a deed; though the effects of it are greater than those of a common bond, being allowed a priority in point of payment.

16. A recognizance *is a lien on all the lands which the cognizor had at the time of its acknowledgment;* and *also* upon all those which he *afterwards acquires;* so that no alienation by the cognizor can prevent the cognizee from extending the land. In case of the death of the cognizor, his lands may be extended, though in the possession of his heir or devisee; and where an estate in reversion, expectant on an estate tail, falls into possession, it then becomes liable to the recognizances, not only of the original donor, but also of all the intermediate heirs, who were entitled to such reversion; because it is a direct lien on the lands, in which it differs from a bond. (*b*)

17. Whenever the cognizee appears in court, and admits *satisfaction*, the recognizance is discharged and vacated on the roll.

(*a*) Tit. 14, § 13. (*b*) (Tit. 14, § 38.) Tit. 17, § 28, 29.

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[1] Provision is made in several of the United States, by which an existing debt may be acknowledged before a magistrate, by an instrument signed and sealed by the debtor, in the form of a recognizance, payable to the creditor; which has, by statute, all the force and attributes of a judgment; and upon which, if the money is not paid at the day, execution issues without further proceeding. See Maine Rev. St. 1840, ch. 137; Mass. Rev. St. 1836, ch. 118; N. Hamp. Rev. St. 1842, ch. 210; Verm. Rev. St. 1839, ch. 26; Connecticut Rev. St. 1849, ch. 8. And see 2 N. York Rev. St. p. 456. In most of the other States, provision is made, in various forms, for the entry of judgment by consent of parties, either in the courts of record, or before justices of the peace, without process. But the law, as to the lien created by a judgment, on the lands of the debtor, is far from being uniform in the United States. See *ante*, tit. 14, § 97, note.

18. A recognizance not enrolled will be considered as a bond, being sealed and acknowledged, and must be paid as a debt by specialty. (*a*)

19. There are two other kinds of recognizances of a private sort, which are said to be in the nature of a statute merchant, and statute staple, of which an account has been already given. (*b*)

20. It has been stated that, by the rules of the common law, no right of action is assignable. But in modern times, *bonds*, *recognizances*, and *judgments* obtained in actions of debt, or * acknowledged under a warrant of attorney, are *constantly assigned;* though in compliance with the ancient principle, the form of assignment of a *chose* in action is in the nature of a declaration of trust, and an agreement to permit the assignee to use the name of the assignor, in order to recover the thing assigned. Therefore, when a bond, recognizance, or judgment is assigned, it must still be sued for in the name of the original obligee or cognizee; the person to whom it is transferred being rather an attorney than an assignee.[1] Our courts of equity, considering that in a commercial country much property must lie in contract, will protect the assignment of a *chose* in action, as much as the courts of law will that of a *chose* in possession. (*c*) * 96

21. The *king* is an exception to this rule, for he might always either grant or receive a *chose* in action by assignment. (*d*)[2]

22. An assignee of a *chose* in action takes it subject to all the equity to which it was liable in the hands of the original party. (*e*)

23. A *defeasance* on a bond, or recognizance, or judgment recovered, is a condition, which, when performed, defeats, or un-

(*a*) Bothomly *v.* Fairfax, 1 P. Wms. 334.
(*b*) Tit. 14, § 13.
(*c*) 2 Bl. Comm. 442. 3 P. Wms. 199.
(*d*) Dyer, 30 b. pl. 208.
(*e*) 1 Ab. Eq. 44. 2 Vern. 692, 765.

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[1] In several of the American States, the assignee of a bond or other money contract, is enabled, by statute, to sue in his own name. But in the absence of any statute, the rule of the common law generally prevails. See 11 Am. Jur. 101–115. 4 Rand. 266.

[2] "No valid objection is perceived against giving the same effect to an assignment to the government of this country." United States *v.* Buford, 3 Peters, R. 12, 30, per M'Lean, J.

does it, in the same manner as a defeasance of an estate. It differs only from the common condition of a bond in this, that the one is always inserted in the bond or recognizance; the other is made between the same parties, by a separate, and frequently, a subsequent deed.[1] This, like the condition of a bond, when performed, discharges and disencumbers the estate of the obligor or cognizor. (*a*)

(*a*) 2 Bl. Comm. 342. (*Supra*, ch. 7, § 25–29.) 1 Inst. 237 a. Fowell *v.* Forrest, 2 Saund. 47, n. 1.

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[1] If the title is *executed*, the defeasance must be contemporaneous, in its execution, with the deed of conveyance; otherwise it will not avail to defeat the estate. *Supra*, ch. 7, § 25–28. It is only where the title is *executory*, that it can be defeated by a subsequent deed. Ibid. § 28; Shep. Touchst. 396; 3 Com. Dig. 354, 355, tit. Defeasance, B. C. 1 Inst. 236 b.

CHAP. IX.

BARGAIN AND SALE.

SECT. 1. *Deeds derived from the Statute of Uses.*
3. *Bargain and Sale.*
11. *Who may convey by.*
15. *What may be conveyed by.*
19. *Requires a pecuniary Consideration.*
27. *A Rent may be reserved.*
SECT. 28. *Must be enrolled.*
32. *Exceptions. Lands in Cities.*
33. *And Terms for Years.*
34. *Relation of Enrolment.*
42. [*Distinguished from Bargains and Sales under authorities.*]

SECTION 1. Having treated of the several kinds of deeds that derive their effect from the common law, we now come to explain the nature and operation of those conveyances that derive their effect from the Statute of Uses.

It has been stated that the *Statute of Uses* has given rise to several new sorts of conveyances, operating contrary to the rules of the common law;[1] it being settled that whenever a use was

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[1] Mr. Preston, in his Treatise on Conveyancing, has well observed, that there are many things which may be done through the medium of a conveyance to uses, which cannot be accomplished by a conveyance merely, and simply at the common law; and he states the following, as a general outline of the more useful points on this subject, arising out of the important learning of Uses.

First. No one can take immediately under a grant, unless he be named as the grantee; and, as a consequence, a child unborn cannot take the first estate limited by the grant; because he is not capable of being the grantee, or of immediate livery. But a conveyance may be made to one person to the use of another person, and a child unborn may be the first *cestui que use.*

"*Secondly.* A man and his wife are considered in law as the same person, and from the legal unity of their persons, a grant from a man to a woman, being his wife, is void. But a grant by a man to another person to the use of his wife, is good; so a devise by a man to his wife is good, since a will does not operate with effect until the death of the testator.

"*Thirdly.* A man cannot, at the common law, make a grant of an estate of freehold to commence *in futuro;* but he can convey the land immediately to an use, which is to give an estate of freehold to commence *in futuro.*

"*Fourthly.* A man cannot make a grant at the common law, reserving to himself a

well raised in any person, the statute immediately transferred the possession to him, without entry or claim, or even assent.

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particular estate, as an estate for years, for life, or in tail; but a conveyance may be made to a man to uses, under which he may limit to his own use an estate for years, for life, or in tail; and if he declare some uses, but leaves an interval for the precise period of his life, the use will result to him for that period.

"*Fifthly.* At the common law, a man cannot grant an estate, reserving to himself a power over that estate. All he can do is to annex a condition to defeat that estate, so as to restore himself, by the operation of the condition, to his own ownership; but a conveyance may be made to uses; and under these uses the former owner may reserve to himself a power of revocation, which in some degree partakes of the nature of a condition; or he may reserve a power of new appointment; and under the latter power he may defeat, either wholly or partially, the use limited in favor of other persons.

"*Sixthly.* On a conveyance at the common law, the estate cannot be defeated by any other means than a condition; and no one except the grantor or his representatives, or in some cases by statute laws, the assignee having the reversion after a particular estate, can take advantage of the condition; but through the medium of a conveyance to uses, powers of revocation and of new appointment may be given, either to the grantor or a stranger; and these powers, when exercised, will defeat the estates previously limited, as far as the estates shall be affected by the revocation or new appointment.

"*Seventhly.* A condition, except when annexed to a lease for years, must defeat the entire estate to which it is annexed; but a power under a conveyance to uses may not only defeat the estate to which it is annexed, but it may abridge or postpone the same, or introduce a particular estate in derogation to the former estate, so as to defeat that estate partially, as in the instances of powers of leasing, jointuring, &c., and appointments in exercise of that power.

"*Eighthly.* No one, taking an estate by grant at the common law, can by rightful alienation confer a title for a longer time than the continuance of his own estate; but under uses in a conveyance, the owner of a particular estate may have a power which will enable him to confer the right of enjoyment after the determination of his own estate, as in the common case of estates for life, with powers of leasing, jointuring, &c.

"*Ninthly.* By the rules of the common law, several persons, taking at *different* times, on account of their coming *in esse* at different periods, must necessarily take as tenants in common. See *Justice Windham's case*, 5 Coke. But under a conveyance to uses, several *cestuis que use*, taking at several times, because they come *in esse* at different periods, may take as joint-tenants, and the estate will vest in those who first come *in esse*, subject to open and devest, when others come *in esse*. This rule also extends to wills.

"*Tenthly.* By the rules of the common law, estates, to give rights of enjoyment to different persons in succession, must be limited by way of particular estates and remainders dependent thereon; and no estate can be limited with effect, in derogation or abridgment of a prior estate. But under a conveyance to uses, one estate may be limited, in derogation or in abridgment of another estate, or so as to defeat the same, as in the common case of springing, future, or executory uses, under powers of leasing and jointuring, powers of revocation and new appointment, powers of sale and exchange, provisoes of cesser, and powers for shifting the estate on refusal to change the name, or on the accession to an estate, &c. Also an estate may, in a conveyance to uses, be

And the possession thus transferred was not a mere seisin or possession in law, but an actual seisin, and possession in fact; not a mere title to enter on the land, but an actual estate. (*a*)

2. *Conveyances derived from the Statute of Uses* are of *two kinds: First*, where the deed only transfers *the use*, which is said to operate *without any transmutation of possession;* because the alteration of the legal seisin and possession is effected by the mere operation of the statute. *Secondly*, where the *legal estate* is transferred by a *common-law assurance*, and a *use is declared* on such assurance. This is said to operate *by transmutation of possession*, because the legal seisin is first transferred by a common law assurance.

*The *first kind* of deed, which operates without transmutation of possession, is *a bargain and sale.* This was well known, and often used before the Statute of Uses; it being then a common practice for a person seised of lands, to bargain and sell to another; in which case, if the consideration was sufficient to raise a use, the bargainor became immediately seised to the use of the bargainee. All which might have been transacted without the formality of a deed. (*b*) *98

4. A bargain and sale is therefore *a contract, by which a person conveys his lands to another, for a pecuniary consideration*, in consequence of which a use arises to the bargainee; and the statute 27 Hen. VIII. immediately transfers the legal estate and posses-

(*a*) Tit. 11, c. 4, s. 9, &c.

(*b*) Plowd. 303. 8 Rep. 24 a.

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limited by way of interpolation, so as to divide or separate two estates, which were before immediately expectant, one on the other, as in the example of an estate for life limited by way of jointure, between the estates of *A*, tenant for life, with remainder to *B*, in tail.

"*Eleventhly.* By the rules of the common law, one fee cannot be limited after or dependent on another fee; or more generally speaking, no estate can be limited after and dependent on a fee previously limited. But in a conveyance to uses a fee may be limited to one person; and on a given event, to happen within the rule prescribed against perpetuities, the fee, or a particular estate may be limited to another person; as in the common case of settlements to the use of one, and his heirs, till marriage, and afterwards to other persons; and also the common case of a limitation to the use of several persons in fee, with limitations over to take effect eventually, either as between themselves or in favor of strangers." 2 Preston, on Conv. p. 475–479.

sion to the bargainee.[1] A bargain and sale may be in fee, for life, or for years. (*a*)

5. The *proper and technical words* of this conveyance are, "*bargain and sell;*" but *any other words* that would have been *sufficient to raise a use*, upon a *valuable consideration*, before the statute, are now sufficient to constitute a good bargain and sale.[2] Proper words of limitation must however be inserted. (*b*)

6. Thus, if a man, for money, alienes and grants lands to one and his heirs, or the heirs of his body, or for life, by deed indented and enrolled, it will amount to a bargain and sale. (*c*)

7. So if a person covenants, in consideration of money, to stand seised to the use of his son in fee; if the deed be enrolled, it will be a good bargain and sale, though the words bargain and sell be not used. (*d*)

8. E. Fox demised lands to G. S. and others, for three lives, reserving rent. Afterwards, by indenture, in consideration of £50 paid him by T. Powis, he demised, granted, set, and to farm let, to the said T. Powis, the same tenements, to hold for the term of 99 years, reserving rent. The first lessee did not attorn; and the question was, whether the demise to Powis should amount to a bargain and sale, so that the reversion, with the rent, should pass to Powis, by the Statute of Uses, without any attornment. It was adjudged that this demise and grant, in consideration of £50, amounted to a bargain and sale for 99 years; there being no necessity for the precise words bargain and sell. It was said, that as uses arise from the inten-
99* tion of the parties, *if, by any clause in a deed, it appears that it was the intent of the parties to pass the land, in possession, by the common law, there no use shall be raised;

(*a*) 2 Inst. 671. (Jackson *v.* Alexander, 3 Johns. 484. Jackson *v.* Florence, 16 Johns. 47.)
(*b*) 2 Inst. 671. (Jackson *v.* Fish, 10 Johns. 456.)
(*c*) 8 Rep. 94 a. Grey *v.* Edwards, 4 Leon. 110. (*d*) Idem.

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[1] If there are limitations to other uses, they are merely trusts in chancery, the *cestui que trust* having only an equitable estate. Matthews *v.* Ward, 10 G. & J. 443.

[2] Thus, the words "*remise, release, and forever quitclaim,*" or the words "*release and assign,*" are sufficient. Jackson *v.* Fish, 10 Johns. 456. And see Fisher *v.* Fields, Ibid. 495, 505; [Lynch *v.* Livingston, 2 Selden, (N. Y.) 422; S. C. 8 Barb. Sup. Ct. 463.] So, the words "*make over and grant.*" Jackson *v.* Alexander, 3 Johns. 484. The word "*convey,*" in a deed, imports a grant, and is sufficient to pass the title of the grantor. Patterson *v.* Carneal, 3 A. K. Marsh. 618.

therefore, if any letter of attorney be in the deed, or covenant, to make livery of seisin of the lands, according to the form and effect of the deed, or other such like, it should not pass by way of use. (*a*)

9. If a father makes a deed of feoffment to his son, and a letter of attorney to make livery, and no livery is made; no use will arise to the son; for then he should be in by the statute in another degree, namely, in the *post.* For the intention of the parties works much, both in the raising and directing of uses. (*b*)

10. If a man, in consideration of natural love and affection, and of money, gives, grants, bargains, sells, enfeoffs, and confirms to B in fee, by deed indented, with a letter of attorney in the deed, to make livery, and the deed is after enrolled within six months; this shall pass as a bargain and sale, notwithstanding the letter of attorney in the deed. For the feoffor has given the feoffee an election to execute the estate one way or the other, and that way which first executes the estate shall stand. (*c*)

11. As a bargain and sale only passes a use, *none but those who are capable of being seised to a use, can bargain and sell;* for there must be a person seised to a use, and a use in *esse*, before the statute can have any operation. From which it follows that neither the king, nor a queen regnant, can convey their lands in this manner. But as *all private persons* may be seised to an use, they may convey their estates by bargain and sale. (*d*) [1]

(*a*) Fox's case, 8 Rep. 93.
(*b*) 1 Inst. 49 a.
(*c*) 2 Roll. Ab. 787, pl. 5. Anon. 3 Leon, 16.
(*d*) *Infra*, s. 42. *Ante*, tit. 11, c. 3.

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[1] It has been doubted whether an infant can convey by bargain and sale, on the ground that he cannot covenant; because he cannot make a *deed* for this purpose, and it is only by deed that a covenant can be created. See 14 Johns. 126, 127, per Spencer, J.; 2 Lomax, Dig. 130; 2 Prest. Con. 250, 251. Mr. Preston, in maintaining this point, is obliged to question the doctrine of Zouch *v.* Parsons, 3 Burr. 1794. But as it is now clearly held, that the deed of an infant is, in general, only voidable, and never void unless in cases where, from their nature, the deed must of necessity be to his injury, it may safely be assumed, that in the United States, an infant who is enabled to convey in any mode, may convey as well by bargain and sale, lease and release, or covenant to stand seised, as by feoffment, or any other method known to the common law. See Bacon on Uses, by Rowe, p. 67, and notes 147, 148. *Supra*, ch. 2, § 12, note.

12. Lord C. B. Comyns says, a corporation may bargain and sell, for they may give a use, though they cannot be seised to a use; and founds this position on the following case. (*a*)

13. The prioress of Hallywell conveyed certain lands by the words *dedi et concessi pro certâ pecuniæ summâ*, to Lord Chancellor Audley and his heirs. It was objected that a bargain and sale by a corporation was not good; for it could not be seised to another's use. But the Court rejected the objection as dangerous; for that such were the conveyances of the greater part of the possessions of monasteries. And it was said that, although such a corporation could not take an estate to another's use, yet they might charge their possessions with a use to another. (*b*)

100* *14. This case appears to be of doubtful authority; for the only principle upon which it can be supported, namely, that lands may be charged with a use, was utterly rejected in Chudleigh's case; in which it was held, that a use being a confidence and trust, it would be an absurdity to say that it was annexed to the land, like a rent or common; and it is now generally admitted that a corporation cannot stand seised to a use. (*c*) [1]

15. *Every estate of freehold in possession in land may be conveyed by bargain and sale;* therefore, every person *seised* in *fee-simple*, *fee tail*, or *for life*, may convey his estate by this assurance; and though it was formerly held that there must be an actual seisin in the bargainor, at the time when the bargain and sale was made, for that without a seisin no use could arise; yet this seems too general; for in Fox's case, it was held that a reversion expectant on a freehold estate, might be conveyed by bargain and sale. And it appears to be now admitted that *estates in remainder and reversion* may be conveyed by this assurance, provided the *right* to them be *actually vested* in the bargainor at the time. (*d*) [2]

(*a*) (2 Com. Dig. 60, cites 2 Leon. 122.)
(*b*) Holland *v.* Bonis, 3 Leon. 175.
(*c*) 1 Rep. 127 a.
(*d*) *Ante*, s. 8.

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[1] The contrary is held in the United States. See *ante*, tit. 11, ch. 2, § 15, note.

[2] If there is no seisin, actual or constructive, in the grantor, no use arises, and no estate passes by the deed. Tabb *v.* Baird, 3 Call, 488; Hopkins *v.* Ward, 6 Munf. 38;

16. A *rent in esse* may be conveyed by bargain and sale, as also an advowson, tithes, commons, or any other incorporeal hereditaments; for they are expressly mentioned in the Statute of Uses. Such incorporeal hereditaments must, however, be in actual existence at the time, otherwise they will not arise from the bargain and sale. (*a*)

17. A person bargained and sold lands to J. S. in fee, together with *a way over other lands.* It was held that no right of way passed, because there was no grant of it in the indenture, but only a bargain and sale of the land, and of a way over the land; which could not be good, for nothing but a use passed by the deed, and there could not be a use of a thing that was not in *esse* at the time, as a way, common, &c., that was newly created; for till such things were created, no use could be raised of them by bargain and sale. (*b*)

18. *No chattel interest* in lands can be conveyed by bargain and sale, because the possessor of it has no seisin out of which a use can arise. It should, however, be observed that, where a person is seised of the freehold of lands, he may by bargain and sale create a chattel interest out of such lands; for having a seisin in himself, he is enabled to raise a use for years, as well as *for any greater estate. And by the very words *101 of the Statute of Uses, the possession is as fully transferred to a *cestui que use* for years, as to a *cestui que use* of a freehold interest; nor will an entry be necessary, in such a case, to vest the legal estate. (*c*)

19. As a bargain and sale is merely a conveyance of a use, and as a use cannot be raised without a consideration, it follows that no bargain and sale can be good without a *consideration,*

(*a*) Taylor *v.* Vale, Cro. Eliz. 166. (*b*) Beaudeley *v.* Brook, Cro. Jac. 189.
(*c*) Marshall *v.* Frank, *infra*, c. 20. Fox's case, *ante*, s. 8. Tit. 11, c. 8, s. 8.

Hall *v.* Hall, 3 Call, 475; [Howard *v.* Howard, 17 Barb. Sup. Ct. 663; Abernathy *v.* Boazman, 24 Ala. 189.] But a formal actual entry upon a disseisor, for the purpose of delivery of the deed upon the land, is sufficient, though the disseisor still remains in possession. Hall *v.* Hall, 3 Munf. 536. And see Mason *v.* Smallwood, 4 H. & McH. 484; Lewis *v.* Beale, Ibid. 488. [A freehold, to take effect *in futuro*, may be conveyed by deed of bargain and sale. Bell *v.* Scannon, 15 N. H. 581; Gorham *v.* Daniels, 23 Vt. 600. But see Marden *v.* Chase, 32 Maine, 329.]

which must also be a *pecuniary* one; for the very name of this assurance imports a *quid pro quo.* (*a*) [1]

20. It is not, however, absolutely necessary that a consideration should be mentioned in the deed, for an averment of a consideration may be made.[2] If a person, in consideration of "*a certain sum of money*," bargains and sells, this is a good consideration to raise a use, without an averment of any sum in certain, for the quantity of the sum is not material; as any sum, however small, is a sufficient consideration. (*b*)

21. Where a person, in consideration of £100, paid by B, bargained and sold lands to B, C, and D, parties to the indenture, the lands passed to them all. For, although the consideration was expressed to be paid by one only, yet it must be intended that it was paid for them all. (*c*)

22. Where *no pecuniary consideration* is given, the deed will be *void as a bargain and sale*, and no use will arise to the bargainee.

23. A person by indenture, reciting that J. S. was bound in a recognizance and bond for him, for divers good causes and considerations, bargained and sold lands to him and his heirs. It was proved that no money was paid; and the conveyance was held void, as a bargain and sale. (*d*)

24. A person, *in consideration of natural love*, and for augmentation of the portion, and preferment in marriage of his daughter, [by deed enrolled,] bargained and sold lands to her. It was resolved that, as no pecuniary consideration was given, the deed could not operate as a bargain and sale. (*e*) †

(*a*) 1 Rep. 176 a. Moo. 569.

(*b*) 2 Inst. 672. *Infra*, c. 20, § 56. Fisher *v.* Smith, Moo. 569. 2 Roll. Ab. 786. 1 Rep. 24 a. 10 Rep. 34 a.

(*c*) 2 Inst. 672.

(*d*) Ward *v.* Lambert, Cro. Eliz. 394. Osborn *v.* Churchman, Cro. Jac. 127.

(*e*) Crossing *v.* Scudamore, 1 Vent. 187.

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[1] See, accordingly, Jackson *v.* Sebring, 16 Johns. 515, 528; Cheney *v.* Watkins, 1 H. & J. 527; Jackson *v.* Delancy, 4 Cowen, 427; Jackson *v.* Pike, 9 Cowen, 69; O'Kison *v.* Patterson, 1 W. & S. 395; Jackson *v.* Cadwell, 1 Cowen, 622; *supra*, ch. 2, §§ 42, 43, notes; and *supra*, § 4; [Corwin *v.* Corwin, 2 Selden, (N. Y.) 342; S. C. 9 Barb. Sup. Ct. 219.]

[2] As to the averment of a consideration, see *supra*, ch. 2, § 38, note.

[† But it enured as a covenant to stand seised in respect of the consideration. Gilb. Uses, 115, (250.)]

25. No use will arise upon a conveyance to a person, *upon trust to pay the debts of the grantor;* where the debts are to be paid *out of the lands conveyed.*

*26. By indenture between Lord Paget and one Trentham, Lord P., in consideration that, with the profits of the lands to be conveyed, Trentham would pay his debts, covenanted to stand seised to the use of Trentham for 24 years. It was resolved that no use arose, for want of a consideration, for the debts were to be paid out of the profits of the lands, so that no consideration moved from Trentham. But it was agreed that, if Trentham was to have paid the debts out of his own lands, that would have been a sufficient consideration, and the deed would have operated as a bargain and sale. (*a*) *102

27. At common law, no rent could be reserved on a bargain and sale, because nothing but a use passed, which was not such an estate as the bargainor could have recourse to for a distress. But after the *Statute of Uses*, it was resolved that a *rent might be reserved on this assurance*, and that the reservation of such rent would be considered as a sufficient consideration to raise a use to the bargainee. (*b*)

28. When the Statute of Uses was made, it was foreseen that all lands would thenceforth be conveyed by bargain and sale, being a conveyance of a private nature. To prevent this, the legislature, in the same sessions, passed an act, 27 Hen. VIII. c. 16, by which it is declared that no manors, lands, tenements, or other hereditaments, shall pass from one to another, whereby any estate of inheritance or freehold shall be made, by reason of any *bargain and sale*, except the same bargain and sale be made by writing indented, sealed, and *enrolled* in one of the King's courts of record at Westminster; or within the county where the lands lie, before the *custos rotulorum*, and two justices of the peace, and the clerk of the peace of the same county, or two of them at the least, whereof the clerk of the peace to be one. (*c*) [1]

(*a*) Lord Paget's case, 1 Leon. 194. (*b*) 1 Inst. 144 a. Wykes *v.* Tyllerd, Cro. Eliz. 595.
(*c*) 2 Inst. 671.

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[1] The registration of all deeds of conveyance in the United States, is regulated by express statutes. See *infra*, ch. 29. The statute of 27 Hen. 8, c. 16, has never been

29. *This statute* requires all bargains and sales of land to be *in writing*. Therefore Lord Coke says, they must not be by print or stamp.[1] It is also required that they be by indenture. Although the indenture may be either on parchment or paper, yet the enrolment must be on parchment; it being so required in the clause of enrolment by the clerk of the peace; the same is implied where the enrolment is in any of the King's courts of record. The time prescribed by the statute for enrolment, is six lunar months, to be computed from the day of the date of
103 * the *deed, which is exclusive. If the deed has no date then the time must be computed from the delivery. (*a*)

30. By the stat. 5 Eliz. c. 26, bargains and sales of lands lying in the counties palatine of Lancaster, Chester, and the bishopric of Durham, are required to be enrolled in the respective courts of those counties. And by the statutes 5 Ann. c. 18, 6 Ann. c. 35, and 8 Geo. II. c. 6, bargains and sales of lands lying within the west, east, and north ridings of the county of York, may be enrolled before the registers of those ridings, and shall be as good as if enrolled at Westminster.

31. By the statute 10 Ann. c. 18, s. 3, it is enacted, that a copy of the enrolment of a bargain and sale, examined with the enrolment, signed by the proper officer, and proved upon oath to be a true copy, so examined and signed, shall be of the same force and effect as the indenture of bargain and sale would be, if the same was produced.

32. There is a proviso in the statute of enrolments, that it shall not extend to lands, &c. lying within any city, borough, or town corporate, wherein the mayor, recorder, &c. have authority to enroll; in consequence of which, lands and tenements in cities and boroughs having the privilege of enrolment, are not within the act; and though the intention of the statute was only to exempt them from enrolment in the courts of Westminster, yet it

(*a*) 2 Inst. 672, 673, 674. 5 Rep. 1. Hob. 140. Thomas *v.* Popham, 2 Dyer, 218 b.

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adopted here, but has always been considered as local, on account of its reference to courts and officers not known in this country. 1 Johns. Cas. 97; *infra*, ch. 10, § 12, note. See also the observations of Mr. Hare, in 2 Smith's Leading Cases, p. 319, 320, (2d Law Lib. ed. 1844.)

[1] This provision of the statute has never been known in practice, in the United States; the use of printed blanks being universal. See 7 Greenl. 495, 496.

is worded in such a manner, that they are discharged from any enrolment whatever. (*a*)

33. The words of this statute only extend to estates of inheritance or freehold; therefore a bargain and sale of lands, for *a term of years, need not be enrolled.*

34. In consequence of this statute, *the freehold does not pass* from the bargainor *until the deed of bargain and sale is duly enrolled.* But if it be enrolled within the time prescribed, then *the enrolment has such a relation back to the date or time of delivery* of the bargain and sale, that the freehold is considered, in law, as having passed, to all intents and purposes, from the bargainor to the bargainee, immediately on the date or delivery of the bargain and sale.[1]

35. Neither the death of the bargainor, nor that of the bargainee, before enrolment, will prevent the passing of the estate. And where the bargainee dies before enrolment of the deed, if the deed be afterwards duly enrolled, his heir will be in by descent. (*b*)

*36. All conveyances or incumbrances made or created *104
by the bargainor, subsequent to the date or delivery of the bargain and sale, and prior to the enrolment, are therefore void as against the bargainee.

37. A person conveyed lands by bargain and sale to one, and afterwards conveyed them to another by bargain and sale. The last deed was enrolled; afterwards the first deed was enrolled, within the six months. It was resolved, that the first bargainee should have the land, as it had relation to make it the deed of the vendor, and to pass the land from the delivery of the deed. (*c*)

38. One Sewster being seised of certain lands in fee, by deed,

(*a*) 2 Inst. 675. (*b*) 2 Inst. 674. Dymmock's case, Cro. Jac. 408. Hob. 136.
(*c*) Bro. Ab. Faits Enrol. pl. 9.

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[1] In those States where no particular time is prescribed by statute, within which deeds must be recorded, it has been questioned, whether the registration, though made in reasonable time, can relate back to the execution of the deed, so as to defeat an intermediate conveyance or attachment. In *Connecticut*, it has been decided that it may; every grantee being entitled to a reasonable time in which to procure his deed to be registered. Beers *v.* Hawley, 2 Conn. R. 467, 469. And see Farnsworth *v.* Childs, 4 Mass. 637, 641, per Parsons, C. J.; Priest *v.* Rice, 1 Pick. 167, per Parker, C. J.; Brown *v.* Baldridge, 1 Meigs, R. 1. And so it is stated, as the general rule of law, by Chancellor Kent. 4 Kent, Comm. 457; [see *post*, ch. 29, § 20, note.]

dated 7th November, bargained and sold them for money. On the 9th of the same month he acknowledged a recognizance; on the 20th, the deed was enrolled. On a *scire facias*, brought upon the recognizance, the question was, whether Sewster was to be considered as having been seised of the lands on the 9th of November, the deed not having been enrolled till the 20th of that month. It was adjudged unanimously, that Sewster was not seised of the lands on the 9th November; for that when the deed was enrolled, the bargainee was in judgment of law seised of the lands from the date of the deed. (*a*)

39. Though the enrolment has relation back, for the advantage of the bargainee, to avoid all mesne incumbrances and conveyances; yet when the lands are also conveyed by fine or feoffment to the bargainee, before enrolment, he shall take by the fine or feoffment. For when a conveyance by the common law, and one by the Statute of Uses, concur, that by the common law shall be preferred; if in a case of this kind, the bargainor incumbers the estate between the execution of the bargain and sale, and the fine, &c., then the enrolment shall have relation back; for the avoiding such mesne incumbrance, in favor of the bargainee. (*b*)

40. It is said by Lord Hardwicke, that if there is a first bargainee, whose deed is not enrolled, and a second bargainee whose deed is enrolled; if the second bargainee had notice of the prior deed, such prior deed shall prevail in equity, for a reason which will be stated hereafter. And if the first bargainee has any other conveyance, as a feoffment, or a lease and release, he shall prevail at law. (*c*)

41. A bargain and sale does not devest any estate, nor can a use be declared on it; as will be shown in the next chapter.

105 * * 42. [In concluding the subject of the present chapter, it may be noticed that bargains and sales under the Statute of Uses, must be distinguished from bargains and sales by executors *having authorities to sell under wills*, and by persons *having authority under acts of parliament*, as commissioners under the bankrupt act, &c.; for these latter must be considered as common-law assurances, and pass a seisin at common law, upon which uses may be declared.] (*d*)

(*a*) Mallery *v.* Jennings, 2 Inst. 674. (*b*) 2 Inst. 671. Flower *v.* Baldwin, Cro. Car. 217.
(*c*) *Vide* c. 28. (*d*) Prest. Ab. 3 Vol. 112–124.

CHAP. X.

COVENANT TO STAND SEISED.

SECT. 1. *Nature of.*
8. *Who may covenant to stand seised.*
9. *What may be conveyed by.*
12. *What Consideration necessary.*
25. *A Use only arises to those within the Consideration.*
29. *The Estate continues till a Use arises.*
SECT. 30. *A Rent may be created by.*
32. *No Estate is devested by this Assurance, or by a Bargain and Sale.*
34. *No Uses can be declared on these Conveyances.*
36. [*Voluntary, unless in consideration of Marriage.*]

SECTION 1. The second kind of conveyance that derives its effect from the Statute of Uses, and operates without transmutation of possession, is called a *covenant to stand seised.* Formerly, if a person had covenanted and agreed for himself and his heirs, that for a certain consideration, another should have his lands, though the lands did not pass for want of livery, yet the use passed to the covenantee. Now, whenever a covenant of this kind is entered into, if the consideration be sufficient, a use arises out of the seisin of the covenantor, which is immediately executed by the statute, in the *cestui que use*, who thereby acquires the legal estate. (*a*)

2. The *proper and technical words* of this conveyance are, "*Covenant to stand seised to the use of A.*," &c. But *any other words* will have the same effect, if it appear to have been *the intention of the parties* to use them for that purpose. Thus, in a case which has been already stated, the words "*bargain and sell*" were held sufficient to create a covenant to stand seised; and in the following case, the words, "*give, grant, and confirm,*" were allowed the same effect. (*b*)

3. A settlement was made in the following words: "If I have

(*a*) Plowd. 301, 303.

(*b*) 2 Vent. 150. Willes, R. 676. Crossing *v.* Scudamore, *ante*, c. 9, s. 24. 1 Mod. 175. (Watts *v.* Cole, 2 Leigh, 622.) [Cobb *v.* Hines, Busbee, Law, (N. C.) 343.]

no issue, and in case I die without issue of my body law-
107 * fully * begotten, then I give, grant, and confirm my land to my kinswoman, S. Stokes, to have and to hold the same to the use of myself for life, and, after my decease, to the use of the said Sarah, and the heirs of her body to be begotten; with remainders over." It was held that this was a good covenant to stand seised. (*a*)

4. G. S., in consideration of his marriage with Ann Story, gave, granted, enfeoffed, aliened, and confirmed certain lands to Ann and W. Story, for life, remainder to the heirs of the body of Ann Story, begotten by G. S., who covenanted that the lands should remain to the same uses. The marriage took effect; and G. S. became a bankrupt. The assignees sold the land, considering the deed as void in law; or if not, that G. S. was tenant in tail. The Court resolved that the deed operated as a covenant to stand seised. (*b*) [1]

5. On the other side, when it does not appear to have been the intention of the owner of the estate to raise a use, though the word "*covenant*" be used, yet the deed will not operate as a covenant to stand seised.

6. A father, tenant in tail, covenanted with his son, in consideration of marriage, that after his death the lands should descend,

(*a*) Harrison *v.* Austin, 3 Mod. 237.

(*b*) Doe *v.* Simpson, 2 Wils. R. 22. Roe *v.* Tranmer, Willes, 682. 2 Wils. 75, S. C. Tit. 16, c. 5, s. 24. Doe *v.* Salkeld, Willes, R. 673.

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[1] See this case in 2 Smith's Leading Cases, 288, with the notes of the learned editor, and of Messrs. Hare & Wallace. See also *infra*, § 12, note.

A deed, defective as a feoffment, for want of livery of seisin; or for commencing *in futuro;* or inoperative for want of the statute number of witnesses; may nevertheless take effect as a covenant to stand seised. Rowletts *v.* Daniel, 4 Munf. 473; Jackson *v.* Swart, 20 Johns. 85; Barrett *v.* French, 1 Conn. 354; French *v.* French, 3 N. Hamp. 234.

Where A made a deed of conveyance to his grandson B, a minor, in consideration that B should live with and work for him during A's life, but that B should come into possession on his coming of full age, on condition that he should pay a certain sum within one year thereafter, and render to A annually a certain share of the fruits of the land; provided, that if B should die within age, the deed to be void;—it was held, that this was a covenant by A to stand seised to the use of B, upon condition, until he should come of age; and that B having performed the condition to that time, the estate was executed in him on his coming of age, without actual entry, as a vested estate in possession, defeasible on his failing to perform the conditions subsequent. Parker *v.* Nichols, 7 Pick. 111.

remain, and be with the son, and the heirs of his body. The Court held that no use was raised; this being an executory covenant; for the manner of raising a use in such a case was, to covenant to stand seised to such a use; or that the land should be to such a use, or that such a one should be seised to the use: here the words were words of covenant. (*a*)

7. A person covenanted, in consideration of natural affection, to stand seised to the use of himself for life, and after his death that the said lands should descend or remain to his cousin B. in fee. Resolved by all the Judges that no use was raised, by reason of the said disjunctive, remain *or* descend; and that it was only a covenant. (*b*)

8. This conveyance being similar in many respects to a bargain and sale, *no person can transfer* lands by it who is *not capable of being seised to a use.*

9. It follows, from the same principle, that *no species of property can be transferred* by covenant to stand seised, *which cannot be conveyed to a use;* and the *covenantor must be seised in possession*, or *entitled in remainder or reversion*, at the time *of the execution of the deed; because the use must *107 arise out of the seisin, or right, which the covenantor has at the time. (*c*)

10. A father covenanted, in consideration of natural affection, to stand seised of all the lands which he had, or should afterwards purchase, to the use of himself for life, remainder to his youngest son and his heirs. It was determined, that the after-purchased lands did not vest in the youngest son by this deed; because a man cannot, by a covenant, raise a use out of land which he has not. (*d*)

11. If two persons are joint-tenants in fee, and one of them covenants that, after the death of his companion, he will stand seised of all the moiety of his companion to certain uses; though the covenantor survives, yet no use will arise, because, at the time of the covenant, he could not grant or charge that moiety. (*e*)

12. A covenant to stand seised being a conveyance of a pri-

(*a*) Blithman's case, 1 Dyer, 55 a.
(*b*) Englefield's case, Jenk. 267. Dyer, 55 a. Samon *v.* Jones, 2 Vent. 318.
(*c*) Tit. 11, c. 3, § 11–18. (Ib. ch. 4, § 11, 12.) *Ante*, c. 9, s. 15.
(*d*) Yelverton *v.* Yelverton, Cro. Eliz. 401. (*e*) Barton's case, 2 Roll. Ab. 790.

vate nature, and valid without enrolment, it is absolutely necessary that the *consideration* be *natural love and affection* to a child, or near relation, or *marriage.* (*a*)[1]

(*a*) (4 Kent, Comm. 492, 493.)

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[1] Upon the rule, that no consideration but consanguinity or marriage will support a conveyance by covenant to stand seised, the following observations were made by Mr. Justice Jackson: — "This seems to be the rule now adopted in the *English* courts; although there is no little confusion on the subject, and many opinions to the contrary. (Vin. Abr. tit. Uses, K. pl. 12; 2 Ves. 255; 7 Co. 133; Cro. Eliz. 394; 2 Rol. Abr. 734.) The statute of 27 Hen. 8, c. 16, requires a bargain and sale to be enrolled; but no such ceremony is required with respect to a covenant to stand seised. Hence it has become necessary, since the statute, to distinguish accurately these two species of conveyances.

"Lord *Coke*, in commenting on this statute, says, that any words in a deed *for valuable consideration*, which would have raised a use at common law, amount to a bargain and sale within the statute; and therefore if a man, by deed indented and enrolled, covenant for valuable consideration to stand seised to the use of another, this would be a bargain and sale within the statute. (2 Inst. 672.) That statute might have been constantly evaded, if the mere form of the instrument had been alone regarded, and if the parties, by using the words "covenant to stand seised," instead of "bargain and sell," had been exempted from the necessity of enrolling the instrument. It is not improbable that, when a covenant to stand seised is said to be good, although made for a valuable consideration only, the reporter understands an instrument for conveying a present interest or estate in that form but which has been duly enrolled; in which case it would in fact operate as a bargain and sale; or in the older cases, they may perhaps refer to the rules of the common law, before the statute of enrolments; and thus the contradictory opinions may be reconciled.

"The object of that statute is, that a sale of land, that is, a conveyance of land for a valuable consideration, which would be good against creditors and purchasers, should be enrolled, in order to give it notoriety, and to prevent frauds on other persons. And such a sale, from the nature of the transaction, passes a present interest to the bargainee. But a covenant to stand seised may be upon certain good considerations merely, and resembles a last will; being a settlement of a man's estate among his family or relations. There being no present valuable consideration to the owner of the land, there is nothing repugnant in his continuing to hold it after the execution of the deed; and, of course, the freehold may, by this mode of conveyance, pass and vest *in futuro*. Such a conveyance being void as against creditors, and subsequent *bonâ fide* purchasers, there was no occasion to require it to be enrolled for their security or protection.

"The principle then seems to be, that a man may convey his land by a covenant to stand seised thereof to the use of another, either for certain good considerations, or for a valuable consideration; but in the latter case the conveyance, being in effect a bargain and sale, must have all the other requisites and qualities of a bargain and sale. One of these qualities is, that it must be to the use of the bargainee, and that another use cannot be limited on that use; from which it follows that a freehold, to commence *in futuro*, cannot be conveyed in this mode; as that would be to make the bargainee hold to the use of another, until the future freehold should vest.

"The statute of 27 Henry VIII. has never been adopted here; but our laws require

13. By indenture between A. Bainton and Edward, his brother, the said A. Bainton, to the intent that the manors therein comprised might descend and remain to the heirs male of his body, and that the same might continue to such of the blood and name of Bainton as in the same indenture should be named, covenanted to stand seised to the use of himself for life, remainder to the use of his brother Edward and his wife for their lives, remainder to his other brothers. It was held that the consideration was sufficient to support the deed, as a covenant to stand seised. (*a*)

14. A man covenanted, in consideration of natural love and affection to his son, to stand seised to the use of his son for life, remainder to the use of such wife as the son should marry, for her life, &c. It was held that a use arose to the wife, she being within the consideration; for it was for the advancement of his posterity; and without a wife, the son could not have any. (*b*)

15. A use will arise to *a wife*, *without any consideration expressed*, upon a covenant to stand seised.

16. R. Bedell, by indenture between him and his wife of the first part, I. his second son of the second part, and M. his third

(*a*) Sharington *v.* Strotton, Plowd. 300.
(*b*) Bould *v.* Winston, 2 Roll. Ab. 786.

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that *all conveyances* of lands shall be acknowledged by the grantor, and recorded in the registry of deeds for the county where the lands lie; otherwise they have no effect, except against the grantors and their heirs." See Welsh *v.* Foster, 12 Mass. 95, 96. See, also, Jackson *v.* Dunsbagh, 1 Johns. Cas. 96, 97, the opinion of Lewis, J., to the same effect.

As to the *degree of relationship* to which the consideration extends, it has been held to include parents and grandparents, children and grandchildren, brothers and sisters, nephews and nieces; *Supra*, ch. 2, § 42, note; but beyond this it is not settled by any express decision that has fallen under the writer's notice, nor has he discovered any rule governing the subject. Mr. Coventry has intimated that it might extend to the third degree in collaterals, and embrace second cousins, but not to include third cousins, "*who* may intermarry." See Coventry on Conveyancers' Evidence, p. 58, 59. But whether the rule is to be taken with reference to the law of marriage, or to the pauper laws, or to moral sentiments, remains still in obscurity.

An illegitimate child or grandchild has been held not to be within the consideration. 2 Roll. Abr. 785; Blount *v.* Blount, 2 Law Rep. 587; Cains *v.* Jones, 5 Yerg. 249. So has a daughter-in-law. Jackson *v.* Cadwell, 1 Cowen, 622. [So has a son-in-law. Corwin *v.* Corwin, 9 Barb. Sup. Ct. 219, S. C. 2 Selden, 342.] So, if the conveyance be to a *stranger, in trust* for the relatives of the covenantor, it is not a good conveyance by way of covenant to stand seised. Jackson *v.* Sebring, 16 Johns. 515.

son of the third part; in consideration of natural love and
109* *affection to his sons, covenanted to stand seised to the use of himself for life, remainder to his wife for life, remainder to his sons in moieties. It was objected, that the wife was not within the consideration expressed in the indenture, and no other consideration could be averred than was contained in the deed; but it was answered and resolved, that a consideration which stood with the deed, and was not repugnant to it, might well be averred; that when he limited the lands to the use of his wife for life, that imported a sufficient consideration in itself; and there needed no averment. (*a*)

17. A. Burt, in consideration of the love and affection he bore to Ann, his wife, and for some provision, in case she survived him, covenanted to stand seised to the use of himself and his wife for their lives, and the life of the survivor, remainder to the issue of their two bodies, remainder to the use of such person or persons as his wife should think fit to dispose to; for want of such disposition, to the use of the lessor of the plaintiff, who was nephew to the covenantor. The Court was of opinion that the lessor of the plaintiff had a title. I. Because he was named in the deed. II. Because it was stated that he was nephew to the covenantor; and though the deed did not mention him as such, yet being expressly named, he might aver himself within the consideration. (*b*)

18. Love and affection to an *illegitimate child*, is not a sufficient consideration to raise a use, in a covenant to stand seised.

19. A person covenanted, in consideration of natural love and affection, to stand seised to the use of himself for life, remainder to A, his reputed son, (who was his bastard,) for life, &c. He also covenanted to levy a fine, or make a feoffment, for further assurance. Afterwards he made a feoffment in fee to the covenantees, in performance of his covenant to the same uses. It was resolved, that no use arose to A, the bastard, by the covenant, for want of a consideration; nor could he take any thing by the feoffment, it being only made for further assurance. (*c*)

20. The *adopting a surname* is not a sufficient consideration to raise a use, in a covenant to stand seised, as was resolved in

(*a*) Bedell's case, 7 Rep. 40. (*b*) Goodtitle *v.* Petto, 2 Stra. 934.
(*c*) Gerrarde *v.* Worseley, Dyer, 374. Frampton *v.* Gerard, 2 Roll. Abr. 785. Perrot's case, Ib.

Sir Christopher Hatton's case; who, having a sister's son named Newport, covenanted, in consideration of his taking the name of Hatton, that he would stand seised to his use; it was held that no use arose, for want of a sufficient consideration. Nor will *the consideration of ancient acquaintance, or being *110 chamber-fellows, or entire friends, be sufficient to raise a use. (*a*)

21. A covenant with *a stranger* that he shall enjoy the land, to the use of the covenantor's son, will not be good.

22. A, by indenture between him and B his son, of the one part, and two strangers of the other part, in consideration of natural love to his son, gave, granted, and enfeoffed the two strangers, to the use of himself for life, remainder to B in tail, remainder over; and covenanted with the two strangers, that they should enjoy the said land, to the uses aforesaid. The deed was sealed and delivered, but no livery of seisin was given; nor was there any attornment. Resolved, that no use was raised by this deed; for a covenant with strangers could not raise a use. (*b*)

23. Where a deed is made in consideration of *a sum of money*, it will not operate as a covenant to stand seised.[1]

24. A person covenanted by indenture, that in consideration of £20 paid him by his son, he would stand seised to the use of him and his heirs. Held, that the indenture must be enrolled, otherwise nothing would pass; for the express valuable consideration tolled the tacit implied consideration of blood: and no other consideration could be averred, than was contained in the deed. (*c*)

25. In the case of a *covenant to stand seised*, a use will arise *only to the persons who are within the consideration;* but no use will arise to those who are strangers to it.

26. Tenant in tail, remainder in fee. The person in remainder, to the intent that his lands should continue and remain in his

(*a*) Jenk. 81. Plowd. 303. 22 Vin. Ab. 195. (*b*) Hore *v.* Dix, Sid. 25.
(*c*) 11 Rep. 24 b. 7 Rep. 39 b. *Contra*, 22 Vin. Ab. 196. Peacock *v.* Monk, 1 Ves. 128.

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[1] The contrary is law in the United States; the reasons for the English rule not existing here. See *supra*, § 12, note. See, also, the observations of Lewis, J., in Jackson *v.* Dunsbagh, 1 Johns. Cas. 96, 97; Wallis *v.* Wallis, 4 Mass. 135; Pray *v.* Pierce, 7 Mass. 381, 384.

family name and blood, covenanted to stand seised to the use of himself and the heirs male of his body, remainder to the use of his brother in tail, remainder to the use of the queen, her heirs and successors. Resolved, that a use arose to the covenantor in tail, and to his brother; but that no use arose to the queen, for want of a consideration. (*a*)

27. P. Risley, by indenture between him and Sir T. D., Sir A. D., T. Risley, his brother, and W. W., covenanted and agreed with them, to stand seised of certain lands, to the use of himself for life, remainder to the use of his wife for life, remainder to the use of the covenantees and their heirs, upon several trusts, for his children. Resolved, that the uses were well raised
111 * and vested * in T. Risley, his brother, he being of the blood of the covenantor; but that no use arose to the other covenantees, they being strangers. (*b*)

28. A covenanted to stand seised to several uses, afterwards to C for 99 years, if he should so long live, remainder to a stranger for the life of C to preserve contingent remainders, remainder over. Agreed by all, that the remainder to the stranger was void. (*c*)

29. In the case of a covenant to stand seised, *the estate continues in the covenantor till a lawful use arises.* Thus, if a person makes a feoffment in fee, to the use of A for life, remainder to the use of B for life, remainder to the use of C in fee; if A refuses, B shall take the estate presently. For the feoffor, by his feoffment, has given all his estate out of him, and all the uses are created out of it, as out of one and the same root; therefore as long as any of the uses can take effect, the feoffor shall not have the land. But in the case of a covenant which raises a use, there the consideration, which is the cause that raises every several use, is several; and all the uses grow and rise out of the estate of the covenantor; therefore, if one refuses, he who is next in remainder shall not take the land presently, but the covenantor shall keep it. (*d*)

30. In consequence of the 4th and 5th sections of the Statute of Uses, *a rent may be created by a covenant to stand seised.*

31. A, in consideration of natural love and affection, cove-

(*a*) Wiseman's case, 2 Rep. 15 a.
(*b*) Smith *v.* Risley, Cro. Car. 529.
(*c*) Whaley *v.* Tankard, 2 Lev. 52, 54.
(*d*) 1 Rep. 154 a.

nanted to stand seised to the use of himself for life, remainder to B his son in tail; and to the intent that B should have a rent issuing out of the lands, during the life of A. Resolved, that B was well entitled to this rent upon the words of the Statute of Uses. (*a*)

32. A *bargain and sale*, and *covenant to stand seised, pass no interest but that which the bargainor or covenantor can lawfully transfer.* For as nothing but a use passes by these conveyances, and as no use can be greater than the estate out of which it is created, where a use is granted for a greater estate than that out of which it is granted, it is merely void; and the statute executes the possession to so much only of the use as is lawfully granted. (*b*)

33. Thus, if a tenant for life, with contingent remainders depending on his estate, conveys in fee by bargain and sale, or *covenant to stand seised, in fee; the bargainee or *112 covenantee will only take an estate for life; and the contingent remainders will not be destroyed. So if a tenant in tail bargains and sells his estate, or covenants to stand seised of it, in fee-simple, the bargainee or covenantee will only acquire a base fee, and the issue in tail may enter, on the death of the bargainor. (*c*)

34. *No uses can be declared* on a bargain and sale, or covenant to stand seised, *but to the bargainee or covenantee*, because these conveyances only pass a use, and the legal estate and possession is transferred by the operation of the statute; so that a use declared upon them is a use upon a use.

35. A widow, in consideration of £400, bargained and sold to her son all her manors, &c., to hold to him and his heirs, to the use of the widow during her life, &c. It was resolved, that the limitation of the use was void; because a use cannot be engendered on a use. (*d*)

36. [*Covenants to stand seised*, are *voluntary conveyances, unless when entered into in consideration of marriage;* in which latter case, the limitations will be supported against subsequent

(*a*) Rivett *v.* Godson, W. Jones, 179.

(*b*) Tit. 11, c. 3, s. 19. (Sand. on Uses, 435–437.)

(*c*) Tit. 16, c. 6, s. 8. Gilb. Uses, 140. Seymor's case, 10 Rep. 95. 1 Atk. 2, tit. 2, c. 2, s. 13.

(*d*) Tyrrel's case, Dyer, 155.

creditors, in respect of those to whom the consideration extends.] (*a*) [1]

(*a*) 3 Mer. 249. 2 Mad. 283.

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[1] It has already been seen, (*supra*, § 12, 23, notes,) that in this country a covenant to stand seised may well be founded on a *pecuniary* consideration. The American student will therefore understand the proposition, that covenants to stand seised are *voluntary* conveyances, as limited to those only which are founded on the consideration of blood.

CHAP. XI.

LEASE AND RELEASE.

SECT. 1. *Origin and nature of.*
7. *Who may convey by, and what.*
8. *Remainders and Reversions.*
11. *Incorporeal Hereditaments.*
SECT. 12. *What Consideration necessary.*
15. *Does not devest any Estate.*
17. *Whether a Use results.*
19. *To whom the Title Deeds belong.*

SECTION 1. There is a *third sort* of conveyance usually classed under those deriving their effect from the Statute of Uses, but of which only one part is derived from that statute, and the other from the principles of the common law. It is called a *lease and release*, but is in fact a bargain and sale for a year, and a common-law release, operating by way of enlargement of estate; and owes its rise to the following circumstances.

2. The framers of the Statute of Uses foresaw that freehold estates would thenceforth become transferable by parol only, without any form or ceremony whatever. The statute of enrolments was therefore made in the same parliament, which would have introduced an almost universal register of conveyances of real estates, but for the omission of bargains and sales for terms of years. (*a*)

3. In the reigns of Hen. VI. and Edw. IV. it was not unusual to transfer freehold estates in the following manner. A deed of lease was made to the intended purchaser for three or four years; and after he had entered into possession, a deed of release of the inheritance was executed to him, which operated to enlarge his estate into a fee simple. When it was found that the Statute of Uses transferred the actual possession without entry, the idea of a lease and release was adopted. A bargain and sale for a year was made by the vendor,[1] to the person to *whom *114

(*a*) *Ante*, c. 9.

[1] The vendor must be *seised;* for if he have less than a freehold estate, no use can arise to the bargainee, under the statute of 27 Hen. 8. See *infra*, ch. 19, § 40.

the lands were to be conveyed; by this a use was raised in the bargainee, without any enrolment, to which the statute transferred the possession. Thus the bargainee became immediately capable of accepting a release of the freehold and reversion; and accordingly a release was made to him, dated the day next after the day of the date of the bargain and sale; all which was considered as equal to a feoffment with livery of seisin. (*a*)

4. Fabian Phillips (*b*) says, this conveyance was first contrived by Serjeant Moore, at the request of Lord Norris, to the end that some of his kindred should not know, by any search of public records, what settlement he should make of his estate. The validity of it was formerly much doubted. Mr. Noy thought that it could not be supported without an actual entry by the bargainee. But it was resolved in 18 Jac. I. (*c*) by the Chief Justices Montague and Howard, and Chief Baron Tanfield, that upon a deed of bargain and sale for years of land, though the bargainee never entered, if afterwards the bargainor makes a grant of the reversion, reciting the lease, to divers uses, it was a good conveyance of the reversion. And in a subsequent case, (*d*) where there was a bargain and sale for years, followed by a release, judgment was given,—"That the lease being within the Statute of Uses, there was no need of an actual entry, to make the lessee capable of the release; for by virtue of the statute, he shall be adjudged to be in actual possession." This is become the most common assurance for the transfer of freehold estates.

5. It is said by Lord Ch. J. North, that he had known it ruled several times, that a lease and release in the same deed was a good conveyance; for priority should be supposed. And it has been determined, that the words "*demise, grant, and to farm let,*" for six months, amount to a good bargain and sale, to ground a release. (*e*)

6. The recital of a lease for a year, in a deed of release, is good evidence of such lease against the releasor, and all claiming

(*a*) 2 Mod. 252. Bac. Ab. tit. Leases, M. 1 Inst. 271.
(*b*) Treat. on Capias.
(*c*) Lutwich *v.* Mitton, Cro. Jac. 604. Cro. Car. 110.
(*d*) Barker *v.* Keat, 2 Mod. 249.
(*e*) 1 Freem. 251. 2 Mod. 252.

under him; but not against strangers, without proving that there was such a deed, and that it was lost or destroyed. (*a*)†

*7. *Every person who is capable of being seised to the use of another*, may convey by this assurance. But neither the king, nor a queen regnant, nor a corporation,[1] can convey in this manner, for the reason already mentioned. And *every species of property that is capable of being conveyed to uses*, may be the subject of a lease and release. (*b*) *115

8. Not only estates in possession, but *estates in remainder* and *reversion may be conveyed by lease and release;*[2] this point is fully proved by Mr. Booth, in an opinion which has been printed. He admits Lord Coke's position, that a release cannot work without a possession; but contends he only means that the estate upon which the release is to work, must be a vested estate; for in the same folio Lord Coke says:—"If a man make a lease for years, remainder for years, and the first lessee enters, a release to him in the remainder for years is good, to enlarge his estate;"—which showed his opinion to be, that it is not necessary the estate to be enlarged should be in actual possession, and that it sufficed if it was a vested estate divided from the possession. (*c*)

9. In the case of Shortridge *v.* Lamplugh, which will be stated in a subsequent part of this chapter, the person who conveyed by lease and release, had only a reversion expectant on a term for years; and this circumstance does not appear to have been noticed either by the counsel, or the Judges. (*d*)

10. Estates in remainder and reversion expectant on estates

(*a*) 2 Lev. 108. 6 Mod. 44.
(*b*) *Ante*, c. 9, s. 11, 12, 13.
(*c*) Cases and Opinions, Vol. II. 144. 1 Inst. 270 a.
(*d*) *Infra*, s. 14.

[† In Ireland, the lease for a year is not required; the usual reference in a release is deemed sufficient evidence of its supposed existence. 9 Geo. 2, c. 5, s. 6, (Irish statute.) In Doe *v.* Saunders, 1 Fox & Smith, Rep. K. B. Ireland, 18, it was decided that the words "in his (the releasee's) actual possession, now being by virtue of a lease made pursuant to the statute," were held not a sufficient recital of the lease within the above act.]

[1] In the United States, a corporation may convey by this method. See *ante*, tit. 11, ch. 2, § 15, note.

[2] Nothing passes by a release, but the right which the releasor then had. 1 Inst. 265; Quarles *v.* Quarles, 4 Mass. 688. Hence, where a mortgagee released to the mortgagor all his right and interest in the mortgaged premises, it was held that this did not effect the mortgagee's lien on the land, acquired by a previous attachment. Lacey *v.* Tomlinson, 5 Day, 77.

for lives, may be conveyed by lease and release; but in cases of this kind, it is inaccurate to say that the releasee is in the actual possession of the premises; the proper expression being, that they are actually vested in him by virtue of the bargain and sale, and the operation of the Statute of Uses. (*a*)

11. *Incorporeal hereditaments*, such as advowsons, tithes, rents, &c., may be conveyed by lease and release, for they are expressly named in the Statute of Uses, or comprised under the general word, *hereditaments*.

12. Although no use could be raised on a bargain and sale, without a pecuniary consideration,[1] yet when the conveyance by lease and release became a common assurance, only a *nominal consideration* of five shillings was mentioned in the bargain
116* and *sale; and it was held, that even *a reservation of a peppercorn rent was a sufficient consideration to raise a use in a bargain and sale to ground a release.* (*b*)

13. With respect to the *deed of release* to the bargainee for a year, there is *no necessity for any consideration*, because it operates as a common-law conveyance. And in the case last cited, the release was expressed to be made for divers good considerations, which was held sufficient.

14. In a writ of error from the Common Pleas, the case was, that T. Ashby demised the lands in question for sixty-one years, reserving rent; afterwards he bargained and sold them for five shillings to Sir W. M. for one year; and by another indenture, dated the day after, he released and confirmed them to Sir W. M. in fee. It was resolved, that the estate was well vested in the releasee, though no consideration was mentioned in the release. (*c*)

15. A conveyance by lease and release *does not devest any estate, or create a discontinuance or forfeiture.* Thus Littleton says:—"By force of a release, nothing shall pass but the right which he may lawfully and rightfully release, without hurt or damage to other persons, who shall have right therein, after his decease." And in a subsequent section, he says:—"If tenant

(*a*) *Ante*, c. 9, § 15. 1 Inst. 270 a, n. 8.

(*b*) Barker *v.* Keat, 2 Mod. 252. (Wentz *v.* Dehaven, 1 S. & R. 317. Coe *v.* Hutton, Ibid. 408.)

(*c*) Shortridge *v.* Lamplugh, 2 Ld. Raym. 798.

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[1] But see *ante*, ch. 10, § 12, 23, 36, notes.

in tail lets the land to another for term of years, by force whereof the lessee hath thereof possession, and the tenant in tail releases all his right in the same land, to hold to the lessee and his heirs, forever, this is no discontinuance; but after the decease of the tenant in tail, his issue may enter; for by such release nothing passed but for term of the life of the tenant in tail. (*a*)

16. *This conveyance will not*, for the same reason, *destroy a contingent remainder.* Therefore, if a person is tenant for life, with a contingent remainder depending on his estate, and he conveys in fee by lease and release, the contingent remainder will not be destroyed. (*b*)

17. *A release may be to uses*, as will be shown in the next chapter; but it has been *doubted* whether there can be *a resulting use* upon a lease and release. In the case of Shortridge *v.* Lamplugh, it was held, that if a lease and release was pleaded to A and his heirs, and no consideration appeared, nor any declaration of uses, it should be intended to be to the use of the releasee; and Powell, J., said that he was not satisfied that the * nature of this conveyance would admit of a resulting *117 use, though much used to raise uses upon to a third person, by express words; yet in strictness, it was a common-law conveyance; and if a lease was made for forty years, and a release thereon without consideration, or limitation of any use, it could not be contended to be to the use of the lessor; for the very extinguishing of the estate of the lessee, was a good consideration. (*c*)

18. Without questioning the case put by Powell, it may be fairly contended, that in the case of a bargain and sale for a year, for a nominal consideration, with a release thereon, without any consideration, the use would result, if no use was declared; for the extinguishment of a term of this kind could not be deemed a consideration; therefore there could be no ground for contending against the use resulting in this case, as well as upon a feoffment. And Lord Holt and Powell agreed, that if there were a particular use declared on the release, the rest would result. (*d*)

19. In cases of conveyances derived from the Statute of Uses,

(*a*) Lit. s. 606.

(*b*) Fearne, Cont. Rem. 473. Willes, Rep. 383. 1 T. R. 788. (Pendleton *v.* Vandevier, 1 Wash. 381, 388.)

(*c*) Tit. 11, c. 4. 2 Salk. 678. 7 Mod. 76.

(*d*) Sanders on Uses, Vol. II. 265. 2 Prest. Conv. 486. 7 Mod. 77.

it is said that the feoffees or releasees are entitled to the *possession of the title deeds;* because they formerly belonged to the feoffees to uses, in order that they might be enabled to defend the title to the land; and though now the Statute of Uses transfers the legal estate to the *cestui que use*, yet that it does not transfer the title deeds. This doctrine is very questionable, as feoffees to uses have only a seisin for an instant, and are never called upon, and could not be called upon, to defend the land; and it seems reasonable to suppose, that where a statute *transfers the legal seisin* of the lands from one person to another, it should also *transfer the deeds* relating to the title of such lands, as they must be totally useless in the hands of a person who has no interest in the estate. (*a*)[1]

(*a*) 1 Inst. 6 a, n. 4. *Vide supra*, Vol. I. title 8, c. 1, s. 81, and note. See also Harrington *v.* Price, 8 Bar. & Adol. 170.

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[1] In the United States, where deeds of conveyance of lands are universally registered, the grantor retains his own muniments of title; the grantee being ordinarily permitted to give in evidence certified copies, from the registry, of all deeds under which he claims or deduces title, to which he was not himself a party, and of which he is therefore supposed not to have the control; the burden of proof being on the other party, to show some circumstances impeaching the deed, and so taking it out of the rule, and requiring its production. Scanlan *v.* Wright, 13 Pick. 523; Woodman *v.* Coolbroth, 7 Greenl. 181; Loomis *v.* Bedel, 11 N. Hamp. 74; Knox *v.* Silloway, 1 Fairf. 201; Kelsey *v.* Hanmer, 18 Conn. 311; 1 Greenl. Evid. § 571, note. *Ante*, tit. 2, ch. 1, § 39, note.

CHAP. XII.

DECLARATION OF USES.

SECT. 1. *Origin and Nature of.*
2. *Must be by Deed or Writing.*
5. *No technical Words necessary.*
7. *How the Lands should be described.*
8. *No Consideration necessary.*
10. *Deeds to lead Uses.*
17. *Deeds to declare Uses.*
26. [*Conflicting Declarations of Use in same Instrument.*]
SECT. 28. *Who may declare Uses.*
29. *Infants.*
32. *Married Women.*
41. *Idiots and Lunatics.*
42. *The Right to declare Uses is coextensive with the Estate.*
45. *Uses may be declared on a Lease and Release.*
47. *The Releasee cannot dissent.*

SECTION 1. With respect to those conveyances derived from the Statute of Uses, which are said to operate by transmutation of possession, they owe their effect to the following principles. Where lands are conveyed by feoffment, fine, or recovery, the legal seisin and estate becomes vested by these conveyances in the feoffee, cognizee, or recoveror. But if the owner of the estate declares his intention that such feoffment, fine, or recovery shall enure to the use of a third person, a use will immediately arise to such third person, out of the seisin of the feoffee, cognizee, or recoveror; and the statute will transfer the actual possession to such use, without any entry or claim. (*a*)

2. Uses might formerly have been declared by parol only. But it is enacted by the *Statute of Frauds*, 29 Cha. II. c. 3, s. 7, "that all declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be *manifested and proved by some writing, signed by the party* who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void and of none effect."

(*a*) 4 tit. 11, c. 4.

3. It has been long settled that the word "*trust*," in this statute, comprehends *uses*. Thus Lord C. J. Holt—" We take trusts and uses to be the same, in respect of trusts in their larger extent, and so within the statute." (*a*)

4. It was not absolutely necessary, under the words of this act, that a declaration of uses should be by deed; for Lord Holt has said, that since the Statute of Frauds, uses might be declared by writing only, without seal. But there has been another act on this subject which will be stated hereafter. (*b*)

5. *No technical words are required in a declaration of uses*, [except in the limitation of the estates.] Lord Holt has said, that it is not even necessary to insert the word *use* in a declaration of uses of a fine or recovery; for that any kind of agreement, which manifestly shows the intent of the parties, will be sufficient. And this is conformable to the law, as it stood before the Statute of Frauds; it having been determined in 2 Jac. I. that a will, though revoked, should operate as a declaration of the uses of a feoffment. (*c*)

6. In conformity to this doctrine it is laid down, *arguendo* by Lord Holt, that if A bargains and sells to B and his heirs, and the deed is not enrolled; or if a deed of feoffment is not executed by livery, and a fine is levied between the same parties, the deed of bargain and sale or feoffment will operate as a declaration of the uses of the fine. (*d*)

7. [It was always considered of importance that in] declarations of the uses of a fine or recovery, the *lands should be described with as much minuteness and accuracy as in a feoffment or release.* For as lands were described in a fine or recovery in the same manner as in a *præcipe quod reddat;* that is, only by the number of messuages, cottages, acres of arable, meadow, and pasture, &c.; it was proper to have a more particular description in the declaration of uses; which was the measure that usually guided juries in ascertaining the estates comprised in a fine or recovery. And there are many instances, where the Court of Common Pleas has directed the description of lands in fines and recoveries, to be amended, in conformity to the deed of uses. Hence arose an obvious propriety in connecting the de-

(*a*) Holt's Rep. 736. 11 Mod. 197.

(*b*) 7 Mod. 76. *Infra*, s. 22.

(*c*) Dyer, 166 n. 1 Ld. Raym. 290. 8 P. Wms. 209. Hussey's case, 1 Roll. Ab. 614. Mytton *v.* Lutwich, W. Jones, 7.

(*d*) 1 Ld. Raym. 291. 12 Mod. 163.

scription in the fine and recovery with that in the deed. There was also an advantage in stating in the deed the description contained in the fine or recovery.](*a*)

*8. *No consideration was necessary to raise a use on a fine or recovery*, although in the case of a bargain and sale, *120 and covenant to stand seised, it has been shown that a consideration is absolutely necessary. The reason of this difference is thus explained by Mr. Hargrave. In the case of a declaration of uses, the estate is passed completely from the grantor, without the aid of a court of equity; therefore it is immaterial whether the use declared on the estate is gratuitous or not; it being sufficient that the grantees receive it coupled with a trust or use. But in the case of a bargain and sale, or covenant to stand seised, the transaction rests in covenant or agreement between the covenantor or bargainor, and the *cestui que use:* and if the covenant or agreement was not founded on the consideration of blood, or a valuable consideration, such as marriage or money, our courts of equity, which, till the stat. 27 Hen. VIII., had the sole cognizance of uses, would not interpose to compel the performance. In fewer words, Chancery would enforce uses, annexed to a perfect gift, however gratuitous they might be; but not those resting on a naked contract, without even so much as the consideration of blood to maintain them. (*b*)

9. It has been stated, that no use will arise, on a covenant to stand seised, to an illegitimate child. Gilbert says, if a man covenants by indenture, in consideration of love and affection, blood and marriage, of his bastard daughter; though this be not a sufficient consideration to raise a use upon a covenant; yet it is expressive of the intent of the party, and therefore shall serve as a sufficient declaration of a use upon a fine, where there needs no consideration. (*c*)

10. Where deeds were *executed prior to the levying fines* or suffering recoveries, they were called *deeds to lead the uses;* and where they were executed *subsequent* to a fine or recovery, they were then called *deeds to declare the uses* of them.

11. With respect to deeds to lead uses, it was resolved in 1 Jac. I.—I. That although they were but directory, and did not

(*a*) *Vide* tit. 35 and 36.
(*b*) 1 Inst. 123 b, n. 8.
(*c*) *Ante*, ch. 10, s. 18. Gilb. Uses, 207.

bind the estate or interest of the land, yet if the fine or recovery was pursued, according to the indentures, there could not be any bare averment against the indentures, that after the making of them, and before the assurance, it was agreed that the assurance should be to other uses. But if another agreement was made by writing, or by other matter, previous to the fine
121 * or * recovery, as high or higher; then the last agreement should stand. II. If the form of the indentures was not pursued, as to the quantity of land, or the time within which, &c., in these cases an averment without writing might be made, that the fine or recovery was to another use or intent than was contained in the indenture. For inasmuch as the indentures were not pursued, it was reasonable that the parties should be admitted to show the cause why they were not pursued, by reason of the new agreement subsequent; which in such case might be as well by word as by writing. III. That although the indentures were not pursued, in circumstance of time, quantity, person, and the like; yet if no other new mean agreement could be proved, the assurance should be, in judgment of law, to the use contained in the indenture. (*a*)

12. The Statute of Frauds made no alteration in the law respecting the efficacy of deeds to lead the uses of fines and recoveries, except that of excluding all averments respecting the intention of the parties. Therefore, where the uses were declared before the fine was levied, or recovery suffered, they could not be controlled by any declaration or deed executed after. But where the fine or recovery was not levied or suffered according to the deed, such deed might be controlled by a subsequent deed. (*b*)

13. Ann Bowyer, by indentures of lease and release, in consideration of a marriage then intended between her and E. Morley, and an agreement on his part to settle a jointure of £300 a year on her, conveyed her estate to trustees, in trust for herself and her heirs until the marriage took effect, and the jointure was made; and afterwards to the use of E. Morley and his heirs. The marriage took place; and soon after, a second deed was executed, dated 29th January, 1665, between Morley and his wife; and the trustees reciting that a fine was already acknowl-

(*a*) Countess of Rutland's case, 5 Rep. 25. (*b*) Tregame *v.* Fletcher, 2 Salk. 676.

edged, and agreed to be levied in due form of law, in the next Hilary Term, between the trustees and Morley and his wife, it was declared that the same should enure to the use of Morley and his heirs. Two days after the execution of this deed, (31st January,) and before the fine was levied, a writing indented was executed between Morley and his wife, whereby they, in consideration of the marriage and other good causes, did covenant, consent, and agree to revoke all former grants, bargains, *contracts, writings, covenants, and obligations made *122 between them, until Morley had performed the agreements in the marriage settlement on his part; and that in default thereof, it might be lawful for the wife and her heirs to enter upon the lands conveyed by the settlement, without the let of the husband or his heirs. The fine was levied on the 9th February in that term. Morley did not settle a jointure pursuant to the agreement, and the wife died without issue. The question was, whether the fine should enure to the use of Morley and his heirs, according to the deed of the 29th January, or to the use of his wife and her heirs, according to the writing of the 31st January.

The Court held that the fine did not enure to the use declared by the deed of the 29th January, but that it was controlled by the writing of the 31st January. (*a*)

*Upon a writ of error to the House of Lords, the judg- *123 ment was affirmed. (*b*)

14. A man and his wife made a mortgage, in 1692, of the wife's estate, and covenanted, in the mortgage deed, to levy a fine in the Easter Term following. The fine was not levied till Trinity Term, 1695. Afterwards, but in that term, in consideration of more money, they joined in a conveyance of the equity of redemption, and covenanted that the fine which had been levied, should be to the uses of this last deed. (*c*)

Lord Hardwicke was inclined to think, as the covenant to levy the fine under the first deed was confined to a particular term, and the fine was not levied till after that, the husband and wife might, by the deed in 1695, covenant that the fine which had been levied, should be to the uses of the latter deed, and

(*a*) Jones *v.* Morley, 1 Ld. Raym. 321. 2 Mod. 159. (*b*) Show. 140.
(*c*) Fleetwood *v.* Templeman, 2 Atk. 79.

that the former deed might be laid out of the case, as the covenant for levying the fine in Easter Term was not strictly pursued.

15. A second deed to lead the uses of a fine or recovery, must be executed by all those who were parties to the first deed, and were concerned in interest, in order to render the first deed void.

16. Philip Stapilton, being tenant for ninety-nine years, if he should so long live, with remainder to trustees, to preserve contingent remainders, remainder to his first and other sons, 124* and *having two sons, Henry and Philip, the father and sons, by deeds of lease and release, dated the 9th and 10th September, 1724, conveyed the premises to two persons as tenants to the *præcipe*, for the purpose of suffering a common recovery, which was to enure, as to part, to the use of Philip the father, for life, remainder to Henry the son, for life, remainder to his first and other sons in tail, remainder to Philip the son, for life, remainder to his first and other sons in tail, &c. There were covenants to suffer a recovery within twelve months, and likewise for further assurances. Before any recovery was suffered, Henry the son, died, leaving issue Henry the plaintiff. Afterwards, by lease and release, 12th and 13th April, 1725, to which the heir of the surviving trustee in the original settlement of 1661 was a party, Philip the father and Philip the son covenanted to suffer a recovery of the same premises, to the use (as to part) of Philip the father, his heirs and assigns; and as to the other part, to the use of Philip the father, for life, remainder to Philip the son, in fee.

In Trinity Term, 1725, a recovery was suffered, in which were the same tenant to the *præcipe*, the same demandant and vouchees (except Henry, who was dead,) as were covenanted to be by the first deed. It was likewise suffered within twelve months after the execution of the first deed. It was proved in the cause that Henry the son, who died before the recovery was suffered, was a bastard; and the question was, whether the son of Henry was entitled to the premises under the declaration of uses made in the year 1724, or whether that declaration was avoided by the subsequent declaration in 1725.

Lord Hardwicke: "The first question in this case is, whether the lease and release on the 9th and 10th of September, 1724,

will amount to a good declaration of the uses of the recovery, notwithstanding the subsequent deed of April, 1725. I am strongly inclined to think that the lease and release of 1724 will amount to a good declaration of the uses of the recovery. This question depends on the construction of law, and the authority of cases upon the declaration of uses. It is true, where there is an agreement to suffer a recovery, and uses are declared, if the recovery is afterwards suffered, though it varies in point of time from the recovery covenanted to be suffered, yet, if there be no subsequent declaration of uses, the recovery will enure to the uses so declared; and before the Statute of Frauds, if the
*deed declaring the uses had not been pursued, a parol *125
declaration of the uses would have been admitted; but if there was a deed declaring the uses, and the recovery was suffered accordingly, that would, before the statute, have excluded a parol declaration of new uses. But even now there may be a subsequent declaration of other uses, but that declaration must be in writing, and such a new declaration of uses depends upon the agreement of the parties; therefore, though it was said at the bar that the declaration of uses is in the power of the tenant in tail, and that he may declare new uses, I take that not to be law; for such subsequent declaration of uses must be by all the parties concerned in interest. And in the case of the Countess of Rutland, (*a*) it is not laid down that the tenant in tail may declare new uses, but it is said *whilst it is directory only, new uses may be declared;* and the meaning of that is, that, as the new uses must arise out of the agreement of the parties, the parties may change the uses, but that must be done by the mutual consent of all the parties concerned in interest; and in that case, it was a mutual agreement of all the parties. But in the present case, the second agreement not being between all the parties concerned in interest, ought not to control the first declaration, and especially as the recovery was suffered within the time prescribed by the first deed, and between the same demandant and tenant." (*b*)

17. With respect to deeds executed subsequent to a fine or recovery, it was formerly doubted whether they could operate so

(*a*) 5 Rep. 25.
(*b*) (Stapilton *v.* Stapilton, 1 Atk. 2.) See Houghton *v.* Tate, 3 Yo. & Jer. 486.

as to direct the uses of such prior fine or recovery; because, where a fine was levied, or a recovery suffered, without any consideration, the use immediately resulted; and when the use was once vested, it was doubted whether it could afterwards be devested, by any subsequent declaration. But it was resolved, in 3 and 4 Phil. and Mary, that a deed, executed four years after a recovery, was sufficient to declare the uses of it. And in a subsequent case, 28 Eliz., it was resolved that an indenture subsequent was sufficient to direct and declare the uses of a precedent recovery. (*a*)

18. A deed of this kind must, however, refer to the recovery; for if there were a variance between the deed and the recovery, the deed would not operate as a declaration of the uses of such recovery.

126* *19. Thus, where a person suffered a recovery, Oct. Mich. 3 Edw. VI., and an indenture was made on the 14th November following, in which it was expressed that all recoveries thereafter to be suffered between the parties, should be to the uses contained in that indenture, it was held that the recovery suffered before should not be to the use of that indenture, though all Michaelmas Term was but one day in law; for the word thereafter excluded all recoveries before suffered, without an averment of the intent. (*b*)

20. A deed to declare the uses of a recovery, may be controlled by a subsequent deed.

21. A feme sole, before the Statute of Uses, suffered a recovery, and intending to marry A. B., she, before the marriage, executed an indenture declaring the use of the recovery to herself and A. B. and their heirs. The recoverors, having notice of the indenture and marriage, executed an estate to the husband and wife, and their heirs. Afterwards the husband and wife, by other indentures, declared that the first indentures were mistaken, for that the use should have been to the heirs of their two bodies, remainder to the heirs of the wife; and they covenanted and agreed to stand seised to the use of themselves in tail, and after to the right heirs of the wife. (*c*)

(*a*) Tit. 11, c. 4. Basset's case, 2 Dyer, 136. Dowman's case, 9 Rep. 7 b.

(*b*) Whetstone *v.* Wentworth, 2 Roll. Ab. 799. Staplehill *v.* Bully, Prec. in Cha. 224. 3 Yo. & Jer. 486.

(*c*) Vavisor's case, 3 Dyer, 307 b.

It was held that the first indenture was corrected by the second; and the first use sufficiently altered, without estate executed.

22. By the statute 4 Ann. c. 16, s. 15, reciting that it had been doubted whether, since the Statute of Frauds, the declarations or creations of uses, trusts or confidences of any fines or recoveries, manifested by deed, made after the levying or suffering of such fines or recoveries, were good and effectual in law; it is thereby declared, "that all declarations or creations of any uses, trusts, or confidences, of any fines or common recoveries of any lands, &c., manifested and proved by any deed then made, or thereafter to be made, by the party who was by law enabled to declare such uses or trusts, after the levying or suffering any such fines or recoveries; were and should be as good and effectual in the law, as if the said act had not been made.

23. A, and B, his wife, levied a fine, and four years after they, by deed, declared the use of it, in which were the following *words:—"All and every fine or fines levied or to be *127 levied, shall be to the uses of the deed." The Court held that this was a good declaration of the use of the fine; the jury having found that the fine was levied to the uses therein declared; and that, notwithstanding the Statute of Frauds, a subsequent deed was as good as it was before that statute was made. It is evident that this determination was founded on the statute 4 Ann.; though it is not mentioned. (*a*)

24. It is observable that in the statute 4 Ann. the word "*deed*" only is used, and the word "*writing*" omitted; from which it has been contended, that a deed is now necessary in all cases, to declare the uses of a fine or recovery; but this statute does not repeal the 7th section of the Statute of Frauds, being only explanatory of it; and if taken literally, can only be extended to declarations of uses made subsequent to a fine or recovery, and not to those made before. (*b*)

25. It was the usual practice, where a fine was intended to be levied to uses, to execute a deed previous to the fine, in which the intended cognizor covenanted to levy a fine, and a declaration was inserted in the deed, of the uses to which the fine, when levied, should enure. Where a recovery was intended to be suf-

(*a*) Bushel *v.* Burland, 11 Mod. 196. Holt's R. 733. Sugd. note to Gilb. Uses, 116.
(*b*) Idem. 112.

fered, a deed was previously executed, to make a tenant to the *præcipe*, in which was contained an agreement to suffer a recovery, and a declaration of the uses of it.

26. [Where there are *conflicting declarations of the use* in the same instrument, the first shall prevail, the maxim being the first deed and the last will. (*a*) †.[1]

27. It has not unfrequently occurred, that in a conveyance to a purchaser to the usual limitations to bar dower, there is a covenant to levy a fine; and the uses of the fine are declared to the purchaser and his heirs, or to him and his trustee and their heirs, nevertheless, as to the estate of the trustee and his heirs, in trust for the purchaser and his heirs. It is presumed that the fine

(*a*) (Plowd. 541. 1 Inst. 112 b, note 144, by Hargrave. Shep. Touchst. 88.)

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† [Doe *v.* Biggs, 2 Taunt. 109. See also, 3 Taunt. 376; 3 Russ. 399.]

[1] This maxim has been applied, especially in the older cases, to the extreme of technicality; it being held, that in every case of conflicting provisions in the same instrument, if it be a deed, the first shall prevail, and if a will, the last. It is at most but a mode of ascertaining the intention of the party, which is the object of search in the interpretation of every instrument; and the good sense of Judges in later times has led them to seek for the intention rather from the entire instrument, than from a consideration of its separate parts. The old rule was resorted to by the Court, in Doe *v.* Biggs, 2 Taunt. 109, in a case of utter and clear repugnancy, only, as Sir James Mansfield remarked, "for want of a better reason;" and it has been well observed, that the rule, which is adopted from necessity, is not very satisfactory; especially on account of the retrospective effect of the execution upon the whole and each part of the will at once. 5 Ves. 247, n. This view, so philosophically just, was evidently entertained by Lord Hobart, though he was speaking only of the different parts of a long sentence. "It is vain," he said, "to imagine one part before another; for though words can neither be spoken nor written at once, yet *the mind of the author comprehends them at once*, which gives *vitam et modum* to the sentence." Hob. 171 *a*. In Sims *v.* Doughty, 5 Ves. 246, 247, the Master of the Rolls thought that the old rule was to be resorted to only where the Court, otherwise, could not act at all; being reduced to the necessity of determining which, of two plain but opposite meanings of the testator, it was its duty to adopt. The modern rule is, to give effect to the whole and every part of the instrument, whether it be a will or a deed, or other contract; to ascertain the general intention, and permit it, if agreeably to law, whether expressed first or last, to overrule the particular; and to transpose the words, wherever it is necessary, in order to carry the general intention, plainly manifested, into effect. See 23 Am. Jur. 277; Covenhoven *v.* Shaler, 2 Paige, 122, 129, 130; Homer *v.* Shelton, 2 Met. 194, 202; Smith *v.* Bell, 6 Pet. 68, 84; Jesson *v.* Wright, 2 Bligh, 56, per Lord Redesdale; Browning *v.* Wright, 2 Bos. & Pul. 13. The cases on wills are collected in Mr. Justice Perkins's note (1) to 1 Jarman on Wills, 393, [411.] The rules of construction of deeds and contracts are expounded with ample learning and good sense, in two articles in The American Jurist, Vol. XXIII. p. 257–290, and Vol. XXIV. p. 1–16; attributed to Mr. Justice Metcalf, whose initials they bear. And see Story on Contracts, § Ch. IX. 2d ed.

would be considered only by way of further assurance, and the limitation in the *habendum* would prevail. But it has been considered more doubtful, if the fine were levied of a term preceding the execution of the deed.] (*a*)

*28. With respect to the persons who are capable of declaring uses; not only *all those to whom the law gives a disposing power are capable of declaring uses*, but also *some* who are *incapacitated* from conveying their estates by any of the common modes of assurance. *128

29. If *an infant* levied a fine, and declared the use of it, such declaration should bind him, as long as the fine remained in force; for inasmuch as he was admitted by the Judges to levy a fine, the law would allow him to declare the use of it; and such declaration would be valid as long as the fine. But an agreement by an infant to levy a fine and suffer a recovery, when he came of age, to certain uses, would not operate as a declaration of the uses of such fine or recovery. (*b*) [1]

30. Thus in the case of Nightingale *v.* Ferrers, a question arose whether the agreement entered into by Lord Ferrers's son, when an infant, amounted to a declaration of the uses of the fine and recovery; and it was declared by Sir J. Jekyll that it did not. (*c*)

31. An infant covenanted to levy a fine by a particular time, to certain uses. Before the time, he attained his full age, and levied the fine, and by another deed, executed after he attained his full age, he declared it to be to other uses. The Court of Common Pleas held, that the last deed was that which should declare the uses of the fine. (*d*)

32. As a *married woman* was allowed to join with her husband in levying a fine, and suffering a recovery, she was also allowed to join with him in declaring the uses of them. And although the wife should be an infant, yet her declaration of the uses of a fine or recovery, if she were allowed to levy or suffer one, would bind her. (*e*)

(*a*) Cro. Eliz. 744. Moo. 680. 1 Saund. Uses, 181, 191. 22 Vin. Ab. 227. Pl. [9, 8.] Cro. Eliz. 306.
(*b*) Beckwith's case, 2 Rep. 56. 10 Rep. 42 b. tit. 35, c. 5.
(*c*) Tit. 11, c. 4, § 56.
(*d*) Frost *v.* Wolveston, 1 Stra. 94.
(*e*) Tit. 35 and 36. Bury *v.* Taylor, 2 Roll. Ab. 798.

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[1] See *supra*, ch. 9, § 11, note; and ch. 2, § 12, note.

33. If a husband alone declared the use of a fine, levied by him and his wife, of the wife's estate, it would bind the wife, unless her dissent appeared; for when she joined her husband in the fine, it must be presumed that she consented to the declaration of the uses of it. (*a*)

34. If a wife concurred with her husband in the sale of her own estate, and afterwards joined with him in levying a fine of it to the vendee and his heirs, it would bind her, without any writing proving her assent. (*b*)

129* *35. A husband and wife levied a fine of the wife's land to a purchaser; afterwards the husband alone declared the uses of it; the question was, whether the wife was bound by the declaration of uses. (*c*)

Lord Hardwicke said, as no other deed was shown that declared different uses, and the uses declared did not vary from what the wife intended, it should bind her; therefore the bill which she had brought, after an acquiescence of fifteen years, since her husband's death, for possession, on suggestion that she was not bound by the fine, as she did not join in the declaration of uses, must be dismissed.

36. Where the wife dissented from her husband's declaration, it was void as to her; therefore if a husband and wife levied a fine of the wife's estate, and an indenture was prepared in the name of the husband and wife, declaring the uses of such fine, which the husband sealed and delivered, but the wife refused to do so, it would not bind her; because her refusal to execute the declaration of uses was a sufficient proof of her dissent. (*d*)

37. A declaration of the uses of a fine or recovery, by a married woman alone, without the concurrence of her husband, was void; because a married woman, being *sub potestate viri*, could not declare the use without him. (*e*)

38. Where a husband and wife made different declarations of the uses of a fine or recovery, they were both void.

39. *C. K. and Eliz. his wife, being seised of lands which were the estate of Eliz., an indenture was executed by Eliz. without the consent of her husband, by which she alone declared the uses of a fine, which afterwards should be levied. Eight years

(*a*) 5 Rep. 57 a. Haverington's case, Ow. 6. (*b*) Lusher *v.* Banbong, Dyer, 290 a., 2 Rep. 57 a.
(*c*) Swanton *v.* Raven, 3 Atk. 105. (*d*) Webb *v.* Worfield, 2 Roll. Ab. 798.
(*e*) 2 Rep. 57 b. Johnson *v.* Cotton, Skin. 275.

after, the husband executed an indenture, without the assent of his wife, by which uses were declared, different from those contained in the deed executed by the wife. The fine was afterwards levied by the husband and wife, to the persons mentioned in the deed executed by the wife; and it was found, that there were no other uses declared. Resolved, that both the declarations of uses were void; and that the fine enured to the use of the wife and her heirs. (*a*)

40. It was also resolved in this case, that if the husband and wife agree in the *declaration* of the uses of *part of the land*, and vary in the declaration of the residue, it will be good for the part in which they agree, and void for the residue. But if there be *a variance in the *limitation* of the first uses, though *130 there be a similarity in the limitation of the subsequent uses, all is void. "For (says Gilbert) as to that part in which they both agree, all the requisites are found necessary to make a declaration, and the defect of the other part can have no influence on that which is good. But if they agree in the limitations for part of the *estate* in the land, and disagree in the other estates, there all is void; for else there will be another moulding of the estates than the feme designs; and her consent is requisite to every estate that shall be created by the limitation of uses; for it is to be ordered by her direction. Thus, if the husband declares the use to himself and wife for life, the remainder to the heirs of the wife; and the wife declares the uses to herself for life, and then to her own right heirs; both declarations are void; and it shall not stand good for the remainder in fee, and be void for the rest; for the estate moving from the wife, whatever uses do take effect, must be by her direction and consent, and in the same manner as she pleases. Though the husband has power over the estate of the wife during coverture, yet if she declares the use one way, and he another, his declaration is absolutely void, and it shall not stand good during the coverture. The reason of the difference seems, that in other cases, the husband having power over the wife's estate, he may grant an interest as from himself, during the coverture, for so long he has power over the estate. But when they levy a fine in fee, the estate passes solely and entirely as one estate in fee-simple from the wife; and the uses that are

(*a*) Beckwith's case, 2 Rep. 56.

declared thereupon must be all with the consent of the wife, for the whole estate; because the whole estate and interest passes from the wife." (*a*)

41. If an *idiot* or *lunatic* were permitted to levy a fine, or suffer a recovery, he might declare the uses of it; because these being matters of record, no averment of idiocy or lunacy was admissible against them. But in cases of that kind, as well as in that of infancy, the Court of Chancery would relieve. (*b*)

42. The *right of declaring the uses* of a fine or recovery was precisely *coextensive with the quantity and nature of the estate or interest which each of the parties had in the lands.* If therefore a tenant for life, and the person entitled to the remainder or reversion joined in levying a fine, or suffering a recovery, they
131 * * might declare the uses, according to their respective estates in the land. (*c*)

43. So if there were two joint tenants who joined in levying a fine, or suffering a recovery, and one declared the use in one manner, and the other in another; each of them should be good for their respective parts. Because the declaration of the uses should be directed and governed according to their several estates and interests. (*d*)

44. It was held, in a modern case, that where a fine was levied by a tenant for life, remainder-man in tail, and reversioner in fee; a declaration of uses by the tenant for life, and the remainder-man in tail did not bind the reversioner. (*e*)

45. It was resolved in Samme's case, 13 Rep. 55, that upon a release which creates an estate, a use may be limited; but that upon a release or confirmation, which enures by way of *mitter le droit*, no use can be limited. It follows, that *a use may be declared on a lease and release in fee;* for in that case, the release creates a freehold estate: and it has been the constant practice for the last century to make all settlements by a bargain and sale for a year, with a release in fee to trustees, and to declare the uses upon that conveyance; in which case the uses arise out of the seisin of the releasees, and are usually declared in the same deed. (*f*)

46. It should however be observed, that *no person can declare*

(*a*) 2 Rep. 58 a. Gilbert, 246.
(*b*) Hob. 224. Tit. 35 & 36.
(*c*) 2 Rep. 57 b. Noy, Rep. 20.
(*d*) 2 Rep. 58 a. Palm. 405.
(*e*) Roe *v.* Popham, 1 Doug. 25.
(*f*) Cases and Opinions, Vol. II. 288.

uses on a lease and release, who is not capable of transferring lands by that mode of conveyance. Therefore, a declaration of the uses of a release by an *infant*, a *married woman*, an *idiot* or *lunatic*, would be void; because an averment of these disabilities might be made.[1]

47. In the case of a *lease and release to uses* the *seisin is in the releasee, without any agreement or assent on his part*, and will serve the uses declared on the release: nor will a subsequent disagreement by the releasee, defeat the uses declared in the release.

48. Thus it is said to have been resolved, that if a man seised of lands in fee, with intent to convey to B in fee for money, demises, grants, bargains and sells to A for years, and after releases in fee to A to the use of B in fee; this release is good before any agreement of A to have it as a bargain and * sale. And if A after elects to have it as a lease * 132 at common law, yet he shall not devest the estate of B thereby. For, *primâ facie*, by the intent of the lessor, A being only named as a means of conveyance for the settlement of the land to B, was possessed as a bargainee; and when the release has settled the estate in B, A cannot, by his election, make it void. (*a*)

(*a*) Gorton's case, (2 Roll. Abr. 787, pl. 7. W. Jones, 206. S. C. nom. Darrell *v.* Gunter.) Gilb. Uses, 224, 305, 8d edit.

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[1] See, as to infants, *supra*, ch. 2, § 12, note; and ch. 9, § 11, note. As to married women, see *supra*, ch. 2, § 24, note (1).

CHAP. XIII.

POWERS OF REVOCATION AND APPOINTMENT.[1]

SECT. 1. *Common-Law Powers.*
3. *Powers derived from Uses.*
5. *Powers relating to the Land.*
6. *Appendant.*
9. *Or in Gross.*
11. *Powers simply collateral to the Land.*
13. *In what Deeds inserted.*
14. *By what Words created.*
22. *A Power to appoint, implies a Power to revoke.*
SECT. 23. *And includes a Right to reserve a new Power.*
25. *Unless the Power be simply collateral.*
27. *To whom Powers may be given.*
28. *Infants.*
30. *Married Women.*
43. *Who may be Appointees.*
44. *A Power does not suspend Remainders.*

SECTION 1. Powers *or authorities* by which one person enabled another to do an act for him, were well known to the common law, and were divided into *two sorts; naked powers*, or bare authorities; and *powers coupled with an interest.* Thus Littleton says, a man may *devise that his executors shall sell* his land, in which case, the power is a naked one. And Lord Coke, in his comment, observes that if a man *devises land to his executors to be sold*, this is a power coupled with an interest. (*a*)[2]

(*a*) Lit. s. 16.

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[1] The American cases on the subject of Powers are very few; the habits of the country seldom calling for the aid of this instrumentality, except so far as relates to the doctrine of Agency, and the duties of Executors;—titles foreign to the plan of this work. The student is therefore referred to the learned treatise of Sir Edward Sugden on Powers, the latest (6th) edition of which is reprinted in the Law Library, Vols. XV. and XVI.; and to the lucid summary of this branch of learning, in Chancellor Kent's Commentaries, Vol. IV., Lect. 62.

[2] Sir Edward Sugden discusses this distinction of Ld. Coke's, and is of opinion that it is not well founded; but that a devise that *the executors shall sell the land*, and a devise that *the land shall be sold by the executors*, and a devise of *the land to be sold by the executors*, all amount to the same thing, conferring a power, but without passing any estate or interest. 1 Sugd. Pow. 128–133, 6th ed. Chancellor Kent adopts the same view. 4 Kent, Comm. 320, 321, note (c.) And see 2 Burr. 1031, per Ld. Mansfield. Woodbridge *v.* Watkins, 3 Bibb, 350.

2. There is a *material difference*, in common-law powers, between a naked power or bare authority, and a power coupled with an interest. In the case of a *naked power*, if it is exceeded in the act done, it is *entirely void.* But in that of a power *coupled with an interest*, it is *good for so much as is within the power*, and void for the rest only. (*a*)[1]

3. With respect to powers derived from the doctrine of uses, it has been stated in a former title, that *powers of revocation and appointment* may be inserted in conveyances which owe their effect to the *Statute of Uses;* and that when executed, the uses originally declared cease, and new uses immediately arise
* to the persons named in the appointment; to which uses * 134
the statute transfers the legal estate and possession. (*b*)

4. Powers, being found to be much more convenient than conditions, were generally introduced into family settlements; and although several of these powers are not usually called powers of revocation, such as powers of jointuring, leasing, and charging settled estates with the payment of money; yet all these are in fact powers of revocation, for they operate as revocations, *pro tanto*, of the preceding estates.

5. Powers of revocation and appointment *may be reserved either to the original owners* of the land, or *to strangers;* from whence arises the *general division of powers*, into those which *relate to the land*, and those which are *collateral* to it. Powers relating to the land, are those which are given to some person having an estate or interest in the land over which they are to be exercised. These are again subdivided into powers *appendant* and *in gross.*

6. A *power appendant* is where a person has an estate in land, with a power of revocation and appointment, the execution of which falls within the compass of his estate; as where a tenant for life has a power of making leases in possession; so if a person limits an estate to such uses as he shall appoint by his will, and in the meantime to the use of himself and his heirs, the settler

(*a*) Jenk. 205.
(*b*) Tit. 11, c. 4. (4 Kent, Comm. 322. 1 Sugd. Pow. 6–10, 6th ed.)

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[1] See the rule stated *infra*, ch. 17, § 47, note.

has a qualified fee, and a power of appointment appendant to his estate. (*a*)

7. In a modern case, the Court of Common Pleas was of opinion, that a power of appointment annexed to an estate in fee-simple was void, as being inconsistent with the estate. Lord Eldon has denied this doctrine, and said it had been long settled, that a person might reserve to himself a power of limiting an estate by an appointment, taking at the same time to himself the whole interest in the fee, over which the power was to be exercised. And in an opinion of Mr. Fearne's, he says, the reservation of a power of appointment of a use, is not rendered void by a subsequent limitation of the fee to the same person. It was a mistake to suppose that a limitation of the fee comprehended every power of appointment whatever; for a person seised in fee could not, by a mere instrument in writing, pass the fee to, or make it vest in another, but a proper form and mode of conveyance was requisite; whereas, under a power of limiting
135 * the use, a * person may by such instrument only, vest the fee in another, without any of the usual ceremonies requisite to a conveyance of lands. (*b*)†

8. Lands were conveyed to A. B., his heirs and assigns, to such uses as C. D. should by deed appoint, and in default of and until appointment, to the use of C. D. in fee; C. D. conveyed the lands in exercise of the power, and the Court of King's Bench, on a case from the Court of Chancery, certified that C. D.'s wife would not be dowable. (*c*)

9. A *power in gross* is, where a person has an estate in the land, with a power of appointment, the execution of which falls out of the compass of his estate; but notwithstanding is annexed in privity to it, and takes effect in the appointee, out of an interest vested in the appointor. (*d*)

(*a*) (4 Kent, Comm. 316. 1 Sugd. Pow. 43, 6th ed.) Hard. 415. Clere's case, 6 Rep. 17 b.

(*b*) Goodhill *v.* Brigham, 1 Bos. & Pul. 192. 1 Ves. 687. 10 Ves. 254. MSS. of Mr. Butler.

(*c*) Ray *v.* Pung, 5 B. & Ald. 561. Doe *v.* Jones, 10 Bar. & Cress. 459.

(*d*) (4 Kent, Comm. 317. 1 Sugd. Pow. 44, 6th ed.)

[† There seems good ground to contend that a devise such as that in Goodhill *v.* Brigham, or the more technical devise to such uses, &c., as A should appoint, and in default of appointment, to A in fee, would be supported as a good devise under the Statute of Wills. See also Sug. Pow. c. 1, s. 5, div. 6.]

10. Thus, where a tenant for life has a power of creating an estate, to commence after the determination of his own, such as to settle a jointure on his wife, or create a term for years, to commence after his death, these are called powers in gross; because the estate of the person to whom they are given, will not be affected by the execution of them. (*a*)

11. *Powers simply collateral* are those which are given to mere strangers, who have no interest in the land.[1] Thus, where powers of sale and exchange are given to trustees, in a settlement, they are said to be collateral to the land. (*b*)

12. A *power relating to the land*, being part of the old dominion, is *favorably expounded;* whereas a *power simply collateral* to the land is considered as a bare authority, and therefore *construed strictly.* (*c*)

13. *Common-law powers*, or authorities, *may be inserted in every species of deed;* but powers *derived from the doctrine of uses* can only be inserted in *deeds deriving their effect from the Statute of Uses*, and operating by transmutation of possession; that is, in declarations of uses of fines, and recoveries, releases, [and feoffments to uses]; for it is doubted whether powers can be inserted in deeds of bargain and sale, or covenants to stand seised. (*d*)

*14. In the creation of powers, there is *no necessity for any technical words;* as it will be sufficient if the intention of the person who creates the power be clearly manifested.[2] Thus, where the words: "And if the said A. B. shall make any estate in fee-simple, or fee tail, then the use shall be," &c., were inserted in a deed, without mentioning any particular lands; it *136

(*a*) Edwards *v.* Slater, Hard. 410.
(*b*) (4 Kent, Comm. 317. 1 Sugd. Pow. 45, 6th ed.)
(*c*) Cowp. 263.
(*d*) *Infra*, c. 15.

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[1] But a power reserved to the settlor, *or any heirs of his body*, to revoke and limit new uses, is not simply collateral. Grange *v.* Tiring, O. Bridgm. 108, 114, 115; 1 Sugd. Pow. 46.

[2] The general rule of law is, that the execution of a power must be according to the substantial intention and purpose of the party creating the power; not restraining or lessening it by a narrow and rigid construction; nor by a loose and extended interpretation, dispensing with the substance of what was meant to be performed. Hawkins *v.* Kemp, 3 East, 441, per Ld. Ellenborough; Jackson *v.* Veeder, 11 Johns. 171, per Thompson, C. J. The rule of equitable construction is the same in Law as in Equity. Right *v.* Thomas, 3 Burr. 1441, 1446.

was resolved that they should be intended of the lands comprised in the deed, and were sufficient to create a power. (*a*)

15. So, where the words were: "It shall be lawful for B to alter, change, &c., any use, and to limit new;" or, "that after altering, changing, &c., said uses, the fine shall be to the new uses limited;" they were held sufficient to create a power. (*b*)

16. A, on his marriage with B, conveyed lands to C, in trust for himself for life, remainder to B for life, remainder to the heirs of their two bodies, remainder to A in fee; with a proviso that in default of issue of the marriage, C should convey to such uses as the survivor should appoint. A devised the land to D, and died without issue. Lord Keeper Wright said, that Dyer's *scintilla juris* remained in C; and though the proviso was unskilfully penned, yet it amounted to a power of revoking and limiting new uses. (*c*)

17. A man made a settlement upon the marriage of his son with one B, in which there was a proviso, that if B should happen to survive her husband, not having issue, or without issue of their two bodies lawfully begotten, B to have power to sell and dispose of such lands. The husband died leaving issue. Some years after, that issue died without issue, and then the wife sold the lands. A bill was brought by the heir of the husband, to have the deeds from the vendee, as not coming in pursuant to the power; and it was insisted for him, that the husband leaving issue, the wife did not survive her husband, not having issue, or without issue; and therefore the power never took effect. The Lord Chancellor said: "There was no occasion in this case to make any artificial construction of the proviso, for that the words thereof fell in naturally with the meaning of the parties, and gave her a power to sell, when the issue failed. For where an estate is made to a man, and the heirs of his body, and if he die without issue, or without heirs of his body, the remainder over, this is a good limitation, whenever the issue fails;
137* *though in that case, if he leaves issue, he cannot properly be said to die without issue. But this was a much stronger case, for death is a single act, and to be performed but

(*a*) (4 Kent, Comm. 319. 1 Sugd. Pow. 115–154, 6th ed.) Snape *v.* Tourton, 2 Roll. Ab. 215.

(*b*) Moo. 611.

(*c*) Epis. Oxon. *v.* Leighton, 2 Vern. 377.

once, and though the issue die without issue, a year after, it cannot be said he died without issue, because he actually left issue; and yet a limitation over in such a case is good; but her surviving was a continuing act, and she survived her husband as much a year after his death, as she did the first moment; and, therefore, if the issue fails during her life, she actually survives without issue, or not having issue, because the issue fails during her survivorship, which continues after the failure of issue; and this was the plain and natural meaning of the words, and agreed with the intention of the parties; which was to give her the disposal of so much lands, in case the issue to be provided for by the settlement failed." And therefore dismissed the plaintiff's bill. (*a*)

18. Where a person has a power to charge lands with a sum of money, he may also charge them with the payment of the interest. For the intention is, that the lands should be charged with the principal money, and that of course must carry interest, otherwise it could not be raised. (*b*)

19. Where a power is given to trustees, to raise a sum of money out of the rents and profits of lands, they may raise it by sale or mortgage; especially where it is to be raised by a certain day, and the annual profits would not be sufficient to raise it on that day. But where the words are to raise a sum of money out of the annual profits, there the trustees cannot sell or mortgage. (*c*)

20. Where there was a power to charge lands with portions for younger children, living at the father's death, a child, *in ventre matris*, was considered within the power. For it might be well looked upon, in equity, to be living at the father's death, *in ventre matris*. (*d*)

21. With respect to common-law powers, created by devise, they will be discussed in title 38. *Devise.*

22. Although *a power to appoint new uses, implies a power to revoke the former ones;* for otherwise the power to appoint new uses could not be exercised; yet it has been held, that a power of revocation alone, does not imply a power of appointing new uses. This doctrine has been contradicted by Sir Edward Sugden, who lays it down, that although in the original settlement a

(*a*) Holt *v.* Burleigh, Prec. in Cha. 293.
(*b*) Boycot *v.* Cotton, 1 Atk. 552. Lewis *v.* Freke, 2 Ves. 507.
(*c*) Trafford *v.* Ashton, 1 P. Wms. 415. Ivy *v.* Gilbert, 2 P. Wms. 13.
(*d*) Beale *v.* Beale, 1 P. Wms. 244. (Swift *v.* Duffield, 5 S. & R. 38.)

power of revocation only be reserved, yet a power to limit
138 * * new uses is implied, and may be executed accordingly;
unless a contrary intention can be collected from the whole instrument, or the estate is expressly limited to other uses. But that every power reserved in a deed, executing a power, will be strictly construed; and therefore a mere power of revocation in such a deed, will not authorize a limitation of new uses. (*a*)

23. A *power of appointment which relates to the land, includes a right to appoint either absolutely, or with a new power of revocation and appointment.* But if a person once executes a power of revocation, and makes an appointment of new uses, *by deed,* over the whole estate, his power is thereby completely exhausted; unless he reserves to himself a new power of revocation and appointment. (*b*)

24. Sampson Hele, being seised in fee of the lands in question, conveyed them in 1684, by lease and release, and fine to trustees; to the use of himself for life, remainder to the use of his son for life, remainder over. In the release there was a power given to Sampson Hele, to revoke the uses contained therein, and to limit other uses; and also to revoke or alter such new limitations, and to declare other uses. Sampson Hele did accordingly, by deed poll, in 1687, reciting his power, revoke the uses limited in the release of 1684, and appointed new uses; and by an indenture in 1704, between him and trustees, reciting the release of 1684, and the power of revocation therein, and also the deed poll of 1687, by which he had revoked the first uses, and limited new ones, did, according to the power and authority to him by the said recited indenture reserved, and the proviso therein specified, revoke the uses limited by the deed poll, and, by virtue of the said power, appointed new ones. The question was, whether the deed poll of 1687, and the uses thereby limited, were well revoked by the indenture of 1704. The Lord Chancellor declared, that this was a new case: that he did not find any authority to warrant such a revocation; nor was there an instance, in any of the authorities which were insisted on, of any such power of revocation; but he referred it to the Judges of the Court of King's Bench, for their opinion, whether the uses limited by the deed poll of 1687, were well revoked by the indenture of 1704,

(*a*) Anon. 1 Stra. 584. Sugd. on Pow. c. 5, s. 7. (*b*) Hatcher *v.* Curtis, 2 Freem. 61.

by virtue of the power of revocation contained in the indenture of 1684. The Judges of the Court of King's *Bench *139 certified their unanimous opinion to be—"That the power of revocation in the indenture of 1684, was fully executed by the deed poll of 1687; and that the further power in the indenture of 1684, to revoke any new appointment of uses, was void in its creation, as to such uses as should afterwards be duly limited, unless a power of revocation should be again expressly reserved, which was not in this case; and consequently, that the uses limited by the deed poll of 1687, were not revoked or annulled by the indenture of 1704." The Lord Chancellor concurred in this opinion, and decreed accordingly. The decree was affirmed in the House of Lords. (*a*)

25. [It would appear, upon the authority of the following case, that] *where the power is* [*simply*] *collateral to the land*, the person to whom it is given, *cannot upon the execution of it, reserve to himself a new power of revocation;* [but the case appears to be very inaccurately reported, and not to have called for the decision; the power was not simply collateral or a mere authority, for the donee of the power had a life-estate, as appears by Mr. Raithby's extract from the Register's book.] (*b*)

26. Sir George Crook having three daughters, declared by his will, that his land should descend and go amongst his daughters, in such shares and proportions as his wife should by deed direct and appoint. The wife made an appointment in pursuance of the power, in which she reserved to herself a power of revocation. The Court said, that as to the power of revocation, the case might be eased of that, for it was only an authority in the wife; and that, being once executed, she could not reserve such power to herself. (*c*)

27. By the common law, *powers and authorities may be given to persons* who, in other cases, are *incapable of disposing of lands*, on account of particular incapacities and disabilities. For the execution of a naked power or authority cannot be attended with any prejudice to the persons laboring under such incapacities; or to those for whose benefit the authority is exercised. (*d*)

(*a*) Hele *v.* Bond, 1 Ab. Eq. 342. Prec. in Cha. 474. Printed cases, Dom. Proc. 1717.
(*b*) 1 Vern. 414. n. 1. (*c*) Wall *v.* Thurborne, 1 Vern. 355. See Sugd. Pow. c. 5, s. .
(*d*) (4 Kent, Comm. 324.)

28. Thus, *an infant* is capable of executing a bare authority; for Lord K. Wright held that a covenant, entered into by an infant on his marriage, was a good execution of a power. It is, however, now settled that where a power is given to an 140* infant, **relating to his own estate*, it must be *inserted in the deed that he may execute it during his infancy*, otherwise his execution of it will have no effect. (*a*)

29. A person devised all his real estate to trustees, in trust to apply the rents and profits thereof for the sole and separate use of his daughter Mary, the wife of W. W., (whom she had married without her father's consent, and who had since become a bankrupt,) during her life, to be at her own disposal, and not subject to the control of her husband. And upon further trust, that they should permit his said daughter, by any deed or writing to be by her duly executed in the presence of three credible witnesses, to give, devise, and bequeathe all his freehold, copyhold, and leasehold estates, to such person or persons as his daughter should think fit; she having a particular regard to his poor relations. Mary, the daughter, living separately from her husband, and having one child by him, did, when of the age of nineteen, in pursuance of the power given her by her father, by will, devise all her real and personal estate to her executors, upon trust for her child, and her other relations. The question was, whether this power, derived to Mary under her father's will, was well executed by her during her infancy. (*b*)

Lord Hardwicke.—"This is a question of great consequence, and never determined before. And as I can find no precedent that a power of this sort, derived under a will, can be executed by an infant, I am unwilling to make one. There are cases, indeed, where infants may execute powers, but there they are mere instruments, and no interest passes from them; as is said 1 Inst. 52 *a.*, that infants may be attorneys to give seisin. Though in fol. 128, *a.* it appears by a quotation from The Mirror, that by the old law they could not be attorneys, nor (fol. 158 *a.*) even summoners. But powers like the present are of a very different nature, being introduced since the Statute of Uses, and coming in the place of conditions, before that statute.

(*a*) 2 P. Wms. 229. (1 Sugd. Pow. 213–220, 6th ed.)
(*b*) Hearle *v.* Greenbank, MSS. Rep. 3 Atk. 695.

Hence it is that conditions and powers are often compared. Now conditions could be executed by infants; but that was only where it was for their benefit. So an infant may present to a church; but that is very different from a power of this sort, for it may be done by a child of a month old, because he is under the inspection of his guardian, and the bishop is judge of the sufficiency of the person presented. But it cannot be *pretended that such a power, as the present, could be *141 executed by a child of one month old. An infant's declaration of the use of a fine is good also, while the fine stands unreversed for infancy, because both make but one conveyance, and the law gives credit to the judge who took the fine. The custom of gavelkind, that an infant may make a feoffment at fifteen, is very different; and bears no resemblance to the present case; particular customs being *lex loci*, and the same as if an act of parliament was made for that purpose. In Lord Buckhurst's case, Moor, 512, it is said *arguendo* by him as counsel, that where an infant may by custom make a feoffment at fifteen, if he makes a feoffment to the use of his will, such will, though void as a will, on account of his infancy, is still a good declaration of uses. This looks as if an infant could execute such a power as that in question; but he cites no authority for what he says, nor can I find any to that purpose, but rather the contrary. Bro. Custom, 50, said there, that though an infant may make a feoffment of gavelkind lands at fifteen, yet he cannot devise them, for the custom shall be taken strictly. And 2 Roll. Ab. 779, that if an infant make a feoffment of gavelkind lands, warranted by the custom, to the use of himself, and afterwards devises the use, this is void, if not warranted by the custom; which last is almost a contradiction of what is said by Moor. In the case of femes covert, executions of powers have been held good. So they were determined to be in Rich *v.* Beaumont, (*a*) by Lord King, and afterwards by the House of Lords; and in Lady Travel's case also, by Lord King. Thence it was inferred they should also be good in case of infants, the disability of femes covert being, as was said, rather greater than that of infants. But I think this latter disability a greater one in the eye of the law; and so did Lord Hobart in Moore *v.* Hus-

(*a*) *Infra*, § 87.

sey, (*a*) in marg. (which marginal notes are well known to be Lord Hobart's own,) who says that coverture was not at common law so far protected as was infancy, and some other disabilities. Upon the ground laid down there, is founded the separate examination of femes covert upon fines, which is otherwise in case of infancy; for the feme covert has no less judgment, as Lord Hobart says, than if discovert. So, in 1 Inst. 246, it was held that a feme sole being disseised, and afterwards taking husband, and during the coverture a descent cast, her entry is thereby taken away, after her husband's death; but otherwise if she was within age at the time of her taking husband; for that no
142* folly *can be imputed to her, she being an infant at the time of her marriage. And in 10 Co. 43 *a*, it is held that an infant is totally disabled from conveying during his minority; and there a difference is taken between recoveries suffered by husband and wife, and by infants; that in the first case they are good, but not in the other. It was said that here the infant was of the age of nineteen, and the Court might judge of her discretion: but that rule lets in much too great latitude, nothing being more vague and uncertain than the different abilities of people at the same age. Some certain age must be fixed by law for presuming discretion; and so it must be to make good a custom, enabling an infant to dispose; as is laid down in Needler *v.* Ep. Winchester. (*b*) If infants could execute powers over their estates, there would be instances of leases or jointures made by them; whereas we daily see applications made for acts of parliament, enabling them thereto. I can find but one case of a power executed by an infant, that is Lord Kilmurry *v.* Gery, cited in Evelyn *v.* Evelyn, 2 P. Wms. 671. It was in 1712, as appears from the Register's book. There was a private act of parliament, 12 Will. III., making good all acts done by Lord Kilmurry during his infancy; and it is therefore by no means an authority that infants may execute such a power as this. This is my opinion as to the general question; but there is something in this case that still strengthens it, from the words of the will, which go throughout to the disability of coverture, and none other, and imply therefore that, had he meant any other, he would have mentioned it. The testator's plain view was, to

(*a*) Hob. 95. (*b*) Hob. 225.

secure his estate to the separate use of his daughter, who was then a strong young woman, not at all likely to die; and it cannot be presumed he had her death at all in view. This is a power coupled with an interest, and so different from a naked authority. The daughter had an equitable interest in her for life, with a power of giving the inheritance to whom she pleased. The equitable reversion remained in her, and if not disposed of by her, would descend to her daughter; which shows it to be a power that was to be executed over her own inheritance. (*a*)

30. A *married woman* may, without her husband, execute a naked authority, whether given before or after her coverture; though no special words be used to dispense with the disability of coverture. Thus, Lord Coke says, if *cestui que use* had devised that his wife should sell his land, and made her executrix, *and died, and she took another husband, she might sell *143 the land to her husband; for she did it *in auter droit*, and her husband should be in by the devisor. (*b*)

31. The rule is the same where both an interest and an authority pass to the wife, if the authority be collateral to, and does not flow from the interest. Because there the two are as unconnected as if they were vested in different persons.

32. A person devised an annuity to a feme sole for life, with power to grant an annuity to any person she should name. The woman afterwards married. It was held that this power continued in her, and was not transferred to the husband. For, by her nomination, she did not anywise charge the lands by virtue of any interest arising from her, but under the power that was given to her for that purpose. (*c*)

33. Where lands are vested in a married woman, upon condition to convey them to others, she may convey them during the coverture, to save the condition. (*d*)

34. If the legal estate in lands is vested in a married woman, in trust for another, some hold that she cannot pass it to the *cestui que trust*, unless her husband joins. This was the opinion of Judge Jones; but Whitlocke and Doddridge dissented, and

(*a*) *Vide* tit. 21, c. 2, s. 22.
(*b*) (1 Sugd. Pow. 183–213, 6th ed.) 1 Inst. 52 a, 112 a.
(*c*) Gibbons *v.* Moulton, Finch, 346. (*d*) W. Jones, 138.

held that the husband's joining was not any more requisite than in the other cases. Mr. Hargrave has observed that perhaps Jones's opinion may be most conformable to strictly legal doctrine; and his thus distinguishing a trust from a power, and a condition, may be accounted for. Trusts are properly the subjects of consideration for the courts of equity only; and though in them the legal estate is made subservient to the trust, yet the courts of law take notice of trusts for very few purposes; nor will it be easy to find an authority for departing from any rule about the effect of legal conveyances, merely in respect of their being a performance of trusts. (*a*)

35. When powers of revocation and appointment were introduced into conveyances to uses, the Judges reasoned by analogy from these principles, and held that coverture did not create an incapacity in a woman to execute a power.

36. A person settled lands on himself for life, remainder to his wife for life, remainder to the issue of the marriage, with a proviso that it should be lawful for his wife, during her life, to demise the premises under certain conditions. After the husband's death, the wife married again, and she and her 144* husband demised *the lands pursuant to the power. It was held in the Exchequer, that this was a good execution of the power, notwithstanding the coverture; for the estate of the lessee was not derived from the estate of the lessor, but arose out of the estate of the feoffees or releasees, in the original settlement. (*b*)

37. In a subsequent case, Lord King held that, where a power was given to a woman to dispose of her estate by will, her marriage suspended the power. And on an appeal to the House of Lords, a case was directed to be made for the opinion of the Judges of the Court of King's Bench; but it does not appear whether any further proceedings took place. It is, however, observable that, in the case of Hearle *v.* Greenbank, Lord Hardwicke says, it was held in this case that a married woman may execute a power. (*c*)

38. If, however, a power be expressly reserved to a woman, to

(*a*) Daniel *v.* Ubley, W. Jones, 137. 1 Inst. 112 a, n. 6.
(*b*) Bayley *v.* Warburton, Com. Rep. 494.
(*c*) Rich *v.* Beaumont, 6 Bro. Parl. Ca. 152. *Ante*, s. 29.

be executed by her, *being sole*, a *subsequent marriage will*, in that case, *suspend the execution of the power.*

39. An unmarried woman settled her estate on herself for life, remainder over, reserving to herself a power, being sole, to make leases for three lives. She afterwards married, and executed the power jointly with her husband. This execution was held not to be pursuant to her power; for by the marriage she became subject to her husband. And the Lord Keeper took a diversity between a naked power and a power that flows from an interest; for where a bare power is given to a feme by will, to sell lands, although she afterwards marries, she may sell the lands, even to her husband. But where a woman, upon a settlement of her own estate, reserves a power, which flows from an interest, that power ought to be executed by the woman whilst sole; and yet he said such powers ought to be taken liberally, though formerly they were taken strictly. (*a*)

40. *A clause is now usually inserted in the deed*, by which a power is given to a woman that she may execute it, whether she be sole or married; in which case *a subsequent marriage will not disable her* from executing it.

41. The proper mode of creating a power of this kind, is to convey the lands to trustees, in trust for the separate use of the woman, remainder to the use of such persons as she shall by deed or will, whether she be sole or covert, appoint. But though no such conveyance be made, and articles only are entered into previous to a marriage, by which it is agreed that the wife shall * have a power to dispose of any estate which may descend to her, it will be sufficient; and a court of equity will support the execution of a power so given.[1] *145

42. By articles before marriage, the intended husband covenanted that he would execute all such acts and conveyances as should be necessary for vesting any estate which might descend to his wife, in such persons as his wife should name, in trust for

(*a*) Antrim *v.* Bucks, 1 Ab. Eq. 343. *Ante*, s. 30.

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[1] Where it was *agreed*, in marriage articles, that the wife should have power, during coverture, to dispose of her real estate by will, and she afterwards devised it to her husband, this was held valid in equity, and her heirs at law were decreed to convey the legal estate to the devisee. Bradish *v.* Gibbs, 3 Johns. Ch. 523.

her sole and separate use; and to be subject to such disposition as she should make thereof, by any deed or writing under her hand and seal, or by her last will and testament. The wife became entitled to a trust estate in some lands, which she devised by her will. It was decreed by Lord Northington, that the power was well created, and that the will of the wife was a good execution of it. (*a*)

On an appeal to the House of Lords, it was contended, on the part of the appellant, that the proper and only methods of enabling a feme covert to dispose of her inheritance by deed or will, operating as an appointment, were either by a conveyance to uses or trusts before marriage, reserving such a power; or else by fine levied by the husband and wife after the marriage, with a deed to lead the uses of it, reserving such a power to her, over the inheritance vested in the cognizees; but unless one of these methods was taken, her will of real estates would be void, as an instrument of conveyance, and could not bind her heirs. Marriage articles being entered into for a valuable consideration, would bind the husband to do all proper acts for enabling his wife to make an effectual disposition of her real estate, notwithstanding her coverture; but when those acts had not been done, the heirs of the wife would be entitled to take advantage of all defects of the will, or in the capacity of the testatrix; just as they would have been entitled to claim by descent, in case, after a power duly reserved to her over a use, or a trust, she had not thought fit to make any appointment in execution of the power.

On the other side it was argued, in support of the power, that the legal estate was outstanding in trustees, and therefore no formal conveyance of it was by any means necessary, as such conveyance could not affect the legal estate, or have any legal operation. It could amount only to a direction to the trustees to become trustees for such persons, intents and purposes, 146* as the * wife should by deed or will appoint; and as the interest of the wife was only equitable, the general agreement and intention of the parties, clearly and indubitably expressed in the articles, were as strong and binding as an equitable conveyance, and did in effect amount to a direction to the

(*a*) Wright *v.* Cadogan, 1 Bro. Parl. Ca. 486. Amb. 468. 2 Eden, 239.

trustees and their heirs to stand seised of the premises, in trust for such person and persons as she should appoint, and, in the mean time for her separate use, exclusive of her intended husband; and especially as the husband, by the articles, actually covenanted to do all necessary acts to enable his wife to make any such disposition or appointment of her estate as she should think fit, either by deed or will; by which covenant he was bound in equity to do all necessary acts for authenticating or establishing any deed or will which she should make. The decree was affirmed. (*a*) [1]

43. With respect to the persons to whom appointments may be made, *all those who are capable of taking lands by any common-law conveyance, may be appointees. A woman* may also take *by an appointment from her husband,* because the estate does not pass immediately from him, but from the trustees. (*b*) [2]

44. It frequently happens that *estates are subject to a power of appointment* in the first taker, *with remainders over, in default of such an appointment;* upon which an opinion formerly prevailed that such a power suspended the vesting of the subsequent limitations, and kept them in contingency. Thus, in Leonard Lovie's case, it was held that the remainders in tail were contingent, and not executed till the death of the feoffor, because he by his will might give away the whole fee-simple; and it being uncertain, till his death, whether they would ever vest or not, they were therefore contingent. And although Lord Hardwicke held the same doctrine in the case of Walpole *v.* Conway, yet it is now settled that in cases of this kind the remainders are vested in the first instance, subject to be devested by an execution of the power. (*c*) [3]

(*a*) Doe *v.* Staple, 2 Term R. 684. (*b*) 1 Inst. 8 a, n. 1.
(*c*) Tit. 16, c. 8. Barnard, R. in Cha. 153.

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[1] This case was commented upon and approved by Chancellor Kent, in 3 Johns. Ch. 541–544.

[2] A married woman, having a power of appointment to her own separate use, may execute it for the benefit of her husband. Hoover *v.* The Samaritan Society, 4 Wheat. 445. And see Bradish *v.* Gibbs, 3 Johns. Ch. 523; Barnes *v.* Irwin, 2 Dall. 199; 1 Yeates, 221, S. C. nom. Barnes *v.* Hart.

[3] Thus, where lands were devised, subject to a naked power in the executor to sell; it was held that the fee vested in the devisee until the sale, and then was vested in the purchaser. Braman *v.* Stiles, 2 Pick. 460.

45. By marriage articles, money was agreed to be laid out in the purchase of lands, to be settled to the use of the husband for life, remainder to trustees during his life, to preserve contingent remainders; remainder to the wife for life, remainder to all and every, the children of the marriage, for such estates, and in such proportions as the husband and wife, or the survivor should appoint; and in default of appointment, to be equally 147* divided *among the children; if more than one, as tenants in common, with cross remainders; if but one child, then to such one in tail; and in default of issue, to the husband, his heirs and assigns forever. Upon a question, whether the inheritance in the lands to be purchased would have vested in the father, it was contended it would not, because, during his whole life, the inheritance, supposing a purchase made, would have been in abeyance; for as he might have limited it to any child, in fee, and the limitation over in default of appointment would then have been out of the question, it was a springing use, resting in suspense during his life. But Lord Hardwicke held, that the father taking an estate for life, by the same settlement, the inheritance would have vested in him. He said, that where no person was seen or known in whom the inheritance could vest, it might be in abeyance. That the fee's being in abeyance, had in some cases occasioned an act of parliament to remedy it, but there it was not so; nor did the power of appointment make any alteration therein; for the whole effect thereof was, that the fee which was vested, was thereby subject to be devested, if the whole was appointed; or if part, so much as was not drawn out of the inheritance still remained in the father, as part of the old fee; and there was no occasion to put the inheritance in abeyance, which the Court never did but from necessity; and would so mould it, by opening the estate, as in Lewis Bowles's case, (*a*) and in several others, as best to answer the purposes of the limitations; but if the appointment was not made, it remained undisturbed. (*b*)

46. Mr. Fearne has observed, that this was not a case in which the estate was originally the father's, or vested in him at all, before the settlement; where the limitation of the fee to him, being the reversion, and part of his old estate, would have re-

(*a*) Tit. 16, c. 1.

(*b*) Cunningham *v.* Moody, 1 Ves. 174.

mained vested in him, till devested by the vesting of a contingent remainder. But it was the case of money to be laid out in lands, where the father's title to the inheritance was to originate in the same settlement as the limitations to the children; and by which, as Lord Hardwicke observed, as the father took also an estate for life, the inheritance, according to the ordinary rules, vested in him. But the general doctrine has been confirmed in the following case. (*a*)

47. By marriage settlement, lands were limited to the use of the intended wife and her heirs, till the marriage; afterwards to *her separate use for her life, remainder to her *148 husband for life, remainder to all the children of the marriage, or such of them, for such estates, and in such shares, as the husband and wife, or the survivor, should by deed appoint; and for want of such appointment, then to the use of all and every the child or children equally. Upon a question, whether the remainders to the children were vested or contingent, it was contended that the power of appointment prevented their vesting, by absorbing the whole fee. (*b*)

Lord Kenyon, after observing that the judgment must depend on the authorities cited, of which the three leading ones were Leonard Lovie's case, Walpole *v.* Lord Conway, and Cunningham *v.* Moody, (*c*) and noticing the opinions in the last two, said he was happy to find that in the last of these cases, where Lord Hardwicke had an opportunity of reconsidering this question more fully, and at a time of life when his judgment was more mature, he determined differently from the opinion held in the two former. He could not find any substantial distinction between that case and the principal one. That the limitations to the children were first subject to a power of appointment to the children, &c., and whether the limitations preceded or followed the power of appointment, made no difference. That the opinion of Lord Hardwicke, in the latter case, was peculiarly deserving of attention; because, when it was discussed, the former one of Walpole *v.* Conway, where he had intimated a different opinion, was pressed upon him; and because he decided the last case at a time when he had the assistance of some of the most

(*a*) Fearne, Cont. Rem. 346. (*b*) Doe *v.* Martin, 4 Term Rep. 39.
(*c*) Tit. 16, c. 8. *Ante*, § 44, 45. 5 Bac. Abr. by Gwillim, 754.

eminent lawyers that ever attended the bar of that Court. Lord Kenyon therefore thought, that on the authority of that case, the remainders to the children were vested, subject to be devested by the execution of the power; and judgment was given accordingly. (*a*)

48. [In addition to the preceding authorities, the doctrine thereby settled is also sanctioned by the dicta of several eminent judges.] †[1]

(*a*) Lawrence *v.* Maggs, 1 Eden, 453. Doe *v.* Dorvell, 5 Term Rep. 518.

[† 2 Bro. C. C. 538; 4 Ves. 636, 771; 1 Scho. & Lef. 293; 7 Ves. 583; 10 Ves. 265. See, also, Sugd. Powers, ch. 2, s. 4, page 151, &c., ed. 5.]

[1] It may be proper in this place to observe that regularly, at common law, a naked authority given to several, without interest, does not survive. But where the words of a will conferring the power can be satisfied, the rule will be relaxed. 1 Sugd. Pow. 141, 6th ed; 4 Kent, Comm. 325. The law on this subject, as it is now understood in England, is thus stated by Sir Edward Sugden:—

"1. Where a power is given to two or more, by their proper names, who are not made executors, it will not survive without express words.

"2. Where it is given to three or more, generally, as, '*to my trustees*,' '*my sons*,' &c., and not by their proper names, the authority will survive while the plural number remains.

"3. Where the authority is given to '*executors*,' and the will does not expressly point to a joint exercise of it, even a single surviving executor may execute it.

"4. Where the authority is given to them *nominatim*, though in the character of executors, yet it is at least doubtful whether it will survive." 1 Sugd. Pow. 144, 6th ed.

In regard to the first three of the above propositions, the law in both countries is supposed to be the same. But as to the fourth, there is little doubt that, in the American Courts, the power would be held to survive; as they look to the objects of the power and the intent of the testator, rather than to the form of expression. So it was laid down in Peter *v.* Beverley, 10 Pet. 582; where Mr. Justice Thompson, in delivering the judgment of the Court, expounded this point in the following terms:—

"The general principle of the common law, as laid down by Lord Coke, (Co. Lit. 112, b.) and sanctioned by many judicial decisions, is, that when the power given to several persons, is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive. But when the power is coupled with an interest, it may be executed by the survivor. 14 Johns. Rep. 553; 2 Johns. Ch. 19.

"But the difficulty arises in the application of the rule to particular cases. It may, perhaps, be considered, as the better conclusion to be drawn from the English cases on this question, that a mere direction, in a will, to the executors to sell land, without any words vesting in them an interest in the land, or creating a trust, will be only a naked power, which does not survive. In such case, there is no one who has a right to enforce an execution of the power. But when any thing is directed to be done, in which third persons are interested, and who have a right to call on the executors to execute the power, such power survives. This becomes necessary for the purpose of effecting the object of the power. It is not a power coupled with an inter-

est in executors, because they may derive a personal benefit from the devise. For a trust will survive though no way beneficial to the trustee. It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question. And when an executor, guardian, or other trustee, is invested with the rents and profits of land, for the sale or use of another; it is still an authority coupled with an interest, and survives. 1 Caines' Ca. in Er. 16; 2 Peere Wms. 102.

"In the American cases, there seem to be less confusion and nicety on this point; and the courts have generally applied to the construction of such powers, the great and leading principle which applies to the construction of other parts of the will, to ascertain and carry into execution the intention of the testator. When the power is given to executors, to be executed in their official capacity of executors, and there are no words in the will warranting the conclusion, that the testator intended, for safety or some other object, a joint execution of the power, as the office survives, the power ought also to be construed as surviving. And courts of equity will lend their aid to uphold the power, for the purpose of carrying into execution the intention of the testator, and preventing the consequences that might result from an extinction of the power; and where there is a trust, charged upon the executors in the direction given to them in the disposition of the proceeds, it is the settled doctrine of courts of chancery, that the trust does not become extinct by the death of one of the trustees. It will be continued in the survivors, and not be permitted, in any event, to fail for want of a trustee. This is the doctrine of Chancellor Kent, in the case of Franklin *v.* Osgood, 2 Johns. Ch. 19, and cases there cited; and is in accordance with numerous decisions in the English courts. 3 Atk. 714; 2 Peere Wms. 102. And it is adopted and sanctioned by the Court of Errors in New York, on appeal, in the case of Franklin *v.* Osgood. And Mr. Justice Platt, in that case, refers to a class of cases in the English courts, where it is held, that although, from the terms made use of in creating the power, detached from other parts of the will, it might be considered a mere naked power to sell; yet, if, from its connection with other provisions in the will, it clearly appears to have been the intention of the testator, that the land should be sold to execute the trusts in the will, and such sale is necessary for the purpose of executing such trusts, it will be construed as creating a power coupled with an interest, and will survive. This doctrine is fully recognized by the Supreme Court of Pennsylvania in the case of the Lessee of Zebach *v.* Smith, 3 Binney, 69. The Court there considered it as a settled point, that if the authority to sell is given to executors, *virtute officii*, a surviving executor may sell; and that the authority given by the will, in that case, to the executors to sell, was to them in their character of executors, and for the purpose of paying debts; an object which is highly favored in the law." See 10 Pet. 564, 565. See also Davone *v.* Fanning, 2 Johns. Ch. 254; Muldrow *v.* Fox, 2 Dana, 79; 4 Kent, Comm. 326, and cases there cited.

A power, coupled with an interest, is irrevocable; and whether given by will or deed, always survives. Bergen *v.* Bennett, 1 Caines' Cas. 15; Osgood *v.* Franklin, 2 Johns. Ch. 1; 14 Johns. 527. S. C.; Hunt *v.* Rousmaniere, 2 Mason, 244.

But a naked power, or one not coupled with an interest, does not necessarily expire at the death of the donor. It may be such as can be executed only after his death; as, a power to executors to sell lands. The naked power, which dies with the donor, is one that must be executed in the name and as the act of the donor or constituent, and not of the donee. See Hunt *v.* Rousmaniere, *supra*.

A power to sell lands, given to several executors, in general terms, must be executed by all who are living and duly qualified. Davone *v.* Fanning, *supra*; McRae *v.* Far-

row, 4 Hen. & Munf. 444; Floyd *v.* Johnson, 2 Litt. 115; Wooldridge *v.* Watkins, 3 Bibb, 350. And the trust is personal, and cannot be delegated to another. Bergen *v.* Duff, 4 Johns. Ch. 368; Conklin *v.* Egerton, 21 Wend. 430; Wills *v.* Cowper, 2 Ohio R. 124. Unless, by force of a statute, it may be executed by an administrator with the will annexed; as in *Kentucky, Virginia,* and *North Carolina,* see 4 Kent, Comm. 327, n. And see *infra,* ch. 17, § 74.

CHAP. XIV.

POWERS TO JOINTURE.[1]

SECT. 1. *Origin and Nature of.*
3. *Restriction as to the clear yearly Value.*
SECT. 4. *Proportioned to the Fortune of the Wife.*

SECTION 1. Soon after the Statute of Uses, the practice of limiting estates in strict settlement became frequent; but as estates for life are not subject to dower, a power was usually given to tenants for life, of appointing an estate to any woman whom they should marry, for their lives, by way of jointure, which is now become almost universal.

2. As a rent charge is a much more convenient species of property than an estate in land, it is the usual practice to give to tenants for life a power of appointing a rent charge, not exceeding a certain annual sum, by way of jointure; and where the power is to appoint all or any part of the lands, the usual way is to appoint certain lands to the wife, with a proviso that in case the person in remainder shall pay to the wife a certain annual sum, by way of rent charge out of the lands, as a jointure, then that he may retain the possession of the whole estate.

3. In powers of this kind, the *common phrase* is, that "*it shall be lawful for the tenant for life to appoint any part of the lands, comprised in the settlement, to his wife, as a jointure, not exceeding the clear yearly value of a certain sum of money.*" And where an appointment of a jointure is made in this manner, clear of all taxes, and other outgoings, this refers to such outgoings and taxes as are in being at the time when the appointment is executed. (*a*)

(*a*) (Blandford *v.* Marlborough, 2 Atk. 542; Tyrconnel *v.* Ancaster, 2 Ves. 502; Ambl. 237; Londonderry *v.* Wayne, 2 Eden, 170.)

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[1] See, on this subject, 2 Sugd. on Pow. ch. 16, p. 309–324, 6th ed.

154 * *4. Powers of jointuring are sometimes given, proportioned to the wife's fortune. And in a case of this kind, if the power be to appoint a jointure not exceeding £100 for every £1000 which the husband acquires, as a marriage portion, and part of the wife's fortune is settled on the husband for life, and after to increase the younger children's portions; although there be no younger children, and it goes back to the wife, yet it will be considered as received by the husband, within the intent of the power; and the husband will be compelled to settle a jointure accordingly. (*a*)

156 * *5. It was resolved by Lord King, that where a tenant for life, with power to make a jointure of £100 a year for every £1000 which he had by his wife, covenanted on marriage to make a jointure accordingly; and also to make an additional jointure, on receiving or becoming entitled to any further money in right of the wife; and after the death of the husband, the widow became entitled to an additional fortune; she shall not compel the remainder-man to make an additional jointure on her, on this account. But, on the other hand, the husband's creditors should not take from the wife that additional fortune. (*b*) †

(*a*) Tyrconnel *v.* Ancaster, 2 Ves. 499. (*b*) Holt *v.* Holt, 2 P. Wms. 648.

[† As to what is a reasonable or equivalent jointure, see Coventry *v.* Coventry, 9 Mod. 12; 10 Mod. 464; 2 P. Wms. 222; Earl of Tankerville *v.* Coke, Moseley, 146; Earl of Tyrconnel *v.* Duke of Ancaster, Amb. 237; 2 Ves. 500; Hervey *v.* Hervey, 1 Atk. 561; Burrell *v.* Crutchley, 15 Ves. 544; Fearne's P. W. 350. On the construction of a power to jointure, see Wigsell *v.* Smith, 1 Sim. & Stu. 321.]

CHAP. XV.

OF POWERS TO LEASE.[1]

SECT. 1. *Origin and Nature of.*
4. *Restrictions annexed to.*
5. I. *As to the Instrument.*
7. II. *As to the Lands to be leased.*
12. *A Qualification destructive of a Power dispensed with.*
20. III. *As to the Time when the Lease is to commence.*
24. *A General Power only authorizes Leases in Possession.*
31. *Unless the Estate be reversionary.*
SECT. 36. *But concurrent Leases are good.*
40. *Powers to lease in Reversion.*
43. IV. *As to the Duration of the Lease.*
49. V. *As to the Rent to be reserved.*
50. *What is the ancient Rent.*
56. *What is the best Rent.*
57. *How it is to be reserved.*
62. VI. *As to the Clauses and Covenants.*
70. *In what Conveyances leasing Powers may be inserted.*

SECTION 1. As all leases made by tenants for life determine by the death of the lessor, powers are usually inserted in modern settlements, enabling the tenants for life to grant leases, to be valid against the persons in remainder and reversion; which are productive of great advantage, not only to the persons interested, but also to the public; for tenants for life are thereby enabled to grant a certain term to the lessee; by this means they get a higher rent, which is equally beneficial to the remainder men and reversioner; and the public is benefited, because the extent and security of the tenant's interest induces him to expend his capital, in the cultivation and improvement of the estate.

2. But lest tenants for life should exert these powers to the prejudice of the persons in remainder or reversion, they are in general *restrained* by the words of the power *from making leases, but on certain conditions;* by which means they are forced to

[1] See, on the subject of this chapter, 2 Sugd. on Pow. ch. 17, p. 327–479. 6th edit.

secure the same advantages to those who may succeed
158* *to the estate, as to themselves. It has therefore been long settled, that the restrictive part of these powers shall be construed strictly against the tenants for life, and in favor of the remainder-men and reversioner; because the conditions upon which powers of this kind are given, are inserted with a view to their interest; and the lessees under such leases, standing only in the place of the tenants for life, and deriving their title merely under the power, if that be not strictly followed, the right of the remainder-men and reversioner to possess the estate, freed from the lease, will take place of the right of the lessees, as superior to it. From whence it follows, that *every circumstance required by the power must be strictly followed*, otherwise the lease will be void. (*a*)

3. *The instruments by which leasing powers are executed*, are *construed more strictly than other deeds of appointment.* For it being expressly required that tenants for life should execute their powers of leasing in a particular manner, that becomes a condition precedent; and if all the circumstances required by the power are not strictly followed, the power is held to be totally unexecuted. So that if an improper covenant is inserted in a lease made under a power, the lease is thereby void in its creation, and not the covenant only; and no acceptance of rent, or other act, by the person in remainder or reversion, will operate as a confirmation of it. (*b*)†

4. The restrictions which are usually annexed to leasing powers relate—I. To *the instrument* by which the power is to be executed. II. To *the lands* to be let. III. To *the time* when the lease is to commence. IV. To its *duration.* V. To *the rent* directed to be reserved. VI. To the *clauses and covenants required* to be inserted in such leases.

5. I. *With respect to the instrument* by which a leasing power is directed to be executed, it is generally required to be by deed indented, sealed, and delivered in the presence of, and attested

(*a*) Fitzg. R. 219. Doe *v.* Cavan, 5 Term. R. 567.
(*b*) *Infra*, c. 17, 18. Doe *v.* Sandham, *infra*, § 66. Doe *v.* Watts, 7 Term R. 83. *Ante*, c. 5.

[† Upon the subject of equitable relief against defective execution of powers of leasing on settlements, see Sudg. Pow. chap. 6, s. 1, division 3, pp. 382, et seq. ed. 5.]

by, two or more witnesses. It is also usually required that the tenant should execute a counterpart of such indenture.

6. *Livery of seisin is not necessary* to be given on a lease of a freehold estate, made under a power; because a lease of this *kind takes effect from the deed by which the power *159 is created; and the legal estate is transferred to the lessee, by the operation of the Statute of Uses. (*a*)

7. II. With respect to *the lands to be leased*, powers of this kind are *generally restrained to those which have been usually let or demised to farmers;* in order to prevent the tenant for life from leasing the mansion-house, gardens, pleasure-grounds, park, or other parts of the land usually occupied by the proprietors of the estate, and deemed necessary to the dignity of the family. This clause is taken from that inserted in the stat. 32 Hen. VIII., by which tenants in tail are enabled to make leases; which has been already stated. And the rules adopted by the Judges, in the cases which have arisen on that statute, apply equally to leases made in pursuance of powers. (*b*)

8. Lands which have been *demised three times*, are considered as lands *usually let.* So lands which have been *demised twice;* but lands which have been only once let, do not fall within the description of lands usually let; for, *usus, fit ex iteratis actibus.* (*c*)

9. Lands not demised for the space of 21 years previous to the making of a lease under a power, are not considered as lands usually let.

10. A person was tenant for life, with power to make leases of all or any of the lands in an indenture of settlement particularly mentioned, which at any time theretofore had been usually letten or demised, for and during the term of 21 years; reserving the rents then usually paid, or more. The tenant for life made a lease of part of the premises contained in the settlement, which had been once let for £100 a year for 21 years, but the term of 21 years had been long expired, and the premises had not been letten after. The question was, whether these lands came within the description of lands at any time theretofore usually demised. (*d*)

(*a*) 1 Vent. 291. 2 Lev. 149. (*b*) *Ante*, c. 5. (*c*) Vaugh. 33.
(*d*) Tristram *v.* Baltinglass, Vaugh. 31.

Lord Ch. Just. Vaughan said, the words *usually demised*, might be taken in two senses; the one for the often farming, or repeated acts of leasing lands, to which sense this case did reasonably extend, the other for the common continuance of lands in lease, for that was actually demised, and so lands leased for 500 years long since were lands usually demised, that was, in lease, though they had not been more than once demised; and the former construction agreed both with the words and 160* intention of the *settlement. But what was not farmed at the time of this proviso's being made, nor for twenty years before, could not be said to be at any time before commonly farmed; for those twenty years was a time before, in which it was not farmed. Besides, the proviso requiring a reservation of the rents thereupon reserved, at the time when the deed was made, necessarily implied that the land demisable by that proviso, must be land then under rent; for when no rent then was, the rent *then*, thereupon reserved, could not be reserved; but the premises in question had then no rent upon them, for they had not been let for twenty years before, nor then; and therefore were not demisable by that power. (*a*)

11. A *covenant to stand seised* is considered as evidence of the usual manner of demising; and the objection, that the covenant to stand seised in question was by way of provision for a younger child, was deemed to be of no weight; for that was every day's practice. (*b*)

12. Where there appears an intention that the tenant for life shall have a power to lease all the lands, and a proviso is inserted that the ancient rents shall be reserved; this shall not confine the power to those lands which have been usually let, but will be construed to extend to all the lands; and the restriction only applied to those lands which have been usually let. And Lord Holt has said, that where a *qualification* is annexed to a power of leasing, which, if observed, goes *in destruction of the power*, the law will dispense with it. (*c*)

13. A conveyance was made of divers manors, rents, and services, to the use of A B for life, with power to make leases of the same, or of any part or parcel thereof, so that such rent or more was reserved on every lease, as was reserved and paid for

(*a*) Earl Cardigan *v.* Montagu, Sugd. Pow. App. 772. No. 18, ed. 5.
(*b*) Right *v.* Thomas, 3 Burr. 1441. 1 W. Bl. 446. (*c*) Carth. 429.

the same within two years then next before. Some part of the premises consisted in woods, that had not been before leased at any rent, within the two preceding years. It was determined that the tenant for life might make leases of that part, reserving such rent as he pleased; because it appeared from the generality of the words, that it was intended he should have power to lease all the lands; and the restrictive clause was meant to apply only to such lands as had been demised for two years before. (*a*)

*14. An estate, which consisted of lands and a rectory, *161 was conveyed to the use of a person for life, with power to let the premises, or any part of them, so as a rent of five shillings was reserved for every acre of land. The tenant for life demised the rectory, which consisted of tithes only, reserving a rent; and the question was, whether the power warranted such a lease. It was argued that it did not, for a construction was to be made upon the whole clause, and the latter words, that required a reservation of rent, should explain the former, and restrain the general word *premises* to land only, or things out of which a rent might issue, which it could not out of tithes. But it was resolved by the Court, on the authority of Cumberford's case, that the lease of the rectory was good; for the power was general and enabling; and the last clause being affirmative, though restrictive, would not restrain the generality of the former ones; therefore the power must be construed to be, to demise the premises that consisted of acres at five shillings an acre; but of what were not acres, no rent need be reserved; and it was said by Lord Hale, that if the power had been to let the manor and rectory, expressly reserving five shillings per acre, the lease had been good of the rectory, without any rent. (*b*)

15. A manor and other hereditaments were settled; with a power to the tenant for life to make leases, excepting the ancient demesne lands, and so as the ancient rent was reserved. It was determined that this power did not enable the tenant for life to demise the copyhold lands held of the manor; because they were part of the demesnes; but that the rents and services of the manor might be demised; notwithstanding that one qualification annexed to the exercise of the power was, that the ancient rent should be reserved; and no rent could be reserved on a lease

(*a*) Cumberford's case, 2 Roll. Ab. 262.

(*b*) Walker *v.* Wakeman, 1 Vent. 294. 2 Lev. 150; 3 Keb. 597.

of rents and services; for it appeared that part of the manor was intended to be comprised within the power, but as the demesne lands were not comprised, the rents and services must be; for the whole manor consisted of demesnes, rents, and services; and if a man had a power reserved to him of making leases of two things, and a qualification was annexed to the power, which could not extend to one of these things, he might make a lease of that thing, without any regard to the qualification. (*a*)

16. A tenant for life, with power to demise all the manors, &c. and hereditaments, or any part thereof, reserving so
162* much *or as great yearly rents, or more, as was then paid,

made a lease of a manor and fishery, which had never been let, together with other premises, reserving a greater rent than had formerly been reserved. It was contended that the manor and fishery were not demisable under the power, as no rent was then paid for them; to which it was answered, that the qualification in the power, with regard to the reservation of rent then paid, could only apply to such parts of the subject of the power as were then let; but the power itself expressly extended to the manors and fishery; and it must have been known, at the time of the settlement, that neither the manors nor fishery were then let; for where a general authority is given by a power to let manors, lands, &c., and afterwards there is a qualification that the usual rent shall be reserved, such affirmative qualification shall not restrain the generality of the power, but shall only apply to the part which was formerly demised. It was also objected, that as the rent was entire, and could not be apportioned, it was not clear that the ancient rent was reserved for that part of the premises which had formerly been let; in answer to which, it was said to be sufficient that the advance on the whole was £30, and that the fishery was worth only £15 a year; and the manor was not of any pecuniary value. (*b*)

Lord Mansfield said, the power was express, to demise the manors and fisheries; they were particularly mentioned in the settlement, and the power went to the whole. They paid under this lease as great a yearly rent as at the time of the settlement, for they paid nothing then; the words therefore were complied with, and this objection could only stand upon intent; but the

(*a*) Winter *v.* Loveden, 1 Ld. Raym. 267; Com. R. 27; 12 Mod. 147; Freem. 507.
(*b*) Goodtitle *v.* Funucan, 2 Doug. 565.

Court thought no such intent appeared. The manors were nominal, of no value, no object of yearly income, the fishery worth only £15 a year; they were convenient to the lessee living on the land, and of no use to the remainder-man; the right of fishing and shooting was reserved to him. For his part, he thought the intent was to give leave to demise all, reserving as much rent in the whole, as had been paid before; and in fact £30 more had been reserved. The Court was of opinion that the lease was good.

17. A power may, however, be taken to be special, and not allowed to extend to all the property compromised in the deed wherein the power is given, if it appear from the nature of the *power, compared with the property, to have been *163 the intention of the parties that it should be special.

18. A power was given to a tenant for life, to make a lease or leases for three lives or twenty-one years, of all or any part of the premises in the indenture comprised, at such yearly rents, or more, as the same were then let at. Lady Baggott, who was the tenant for life, married Sir A. Oughton, and made a lease to him of the capital messuage for twenty-one years; but reserved no rent. It was resolved, that this lease was void; and the judgment is said to have been affirmed in the House of Lords. (*a*)

19. A person devised his estate in strict settlement, and gave to all the tenants for life a power to grant, demise, and lease all or any of the said manors, parts of manors, messuages, lands, tenements, and hereditaments; so as the usual rents and other yearly payments, dues, reservations, and heriots, were from time to time reserved, and made due and payable. A tenant for life made a lease of certain tithes, which had never been leased before; and the question was, whether that lease was good. (*b*)

Lord Kenyon said, when he first read over the case, he entertained no doubt upon the question; but when Cumberford's case (*c*) was stated at the bar, he wished to see on what ground the Court proceeded in determining it. For if certain legal ideas were annexed to certain technical words, as in the case of limitations of real estates, it would be extremely dangerous to depart

(*a*) Baggott *v.* Oughton, 8 Mod. 249. Sugd. Pow. 590, ed. 5.
(*b*) Pomery *v.* Partington, 3 Term R. 665. See also Foot *v.* Marriot, 3 Vin. Abr. 429, pl. 9.
(*c*) *Ante*, s. 13.

from the sense given to them by the law, however apparent the intention of the parties might be to the contrary. Now on looking into that case, the rule would be found to be clear and undoubted; but the counsel who argued Goodtitle *v.* Funucan, (*a*) in stating Cumberford's case omitted the most important words; namely, that the intention of the parties was to govern. If that was the rule, and the Judges, in construing the particular words of different powers, had appeared to make contrary decisions at different times, it was not that they had denied the general rule, but because some of them had erred in the application of the general rule to the particular case before them; for in all the cases they professed to determine upon the intention of the parties. It was not necessary to go into all the cases, because they were all arranged in Douglas, and the due effect given to them by Lord Mansfield; from all which he at last extracts the general rule, that the construction of these powers must 164 * be *governed by the intention of the parties; and in applying that rule to the case of Baggott *v.* Oughton, he said: —"In a family settlement of an estate, consisting of some ground, always occupied together with the seat, and of lands let to tenants upon rents reserved, the qualification annexed to the power of leasing, that the ancient rent must be reserved, manifestly excluded the mansion-house, and lands about it, never let. No man could intend to authorise a tenant for life to deprive the representative of the family of the use of the mansion-house. The words in such a case show that the power is meant to extend only to what has been usually let; by that means the heir enjoys all the premises in the settlement, just as they were held by his ancestor, the tenant for life; he has the occupation of what was always occupied, and the rent of what was always let."

Now the whole of this reasoning applied most pointedly to the case before the Court; these tithes never had been let, but had always been occupied by the possessor of the estate; therefore he did not think that the case of Baggott *v.* Oughton could be distinguished from this in principle. This was the broad ground on which he was of opinion that the lease in question was not a valid one. The other Judges concurred; and Mr.

(*a*) *Ante*, s. 16.

Justice Buller observed, that in the case of Goodtitle *v.* Funucan, the Court relied on the words at the end of the power,—"or proportionably for any part thereof," though no notice was taken of it in the printed report. For those words showed that it was the intention of the parties that the *quantum* of the rent, and not any particular part of the premises included in the settlement, was to guide the person in executing the power. But in this case the devisor did not intend that any part of the estate should be let, but that which had been usually demised before. (*a*)

20. III. The *third restriction* usually inserted in powers of leasing, relates to *the time when the lease is to commence;* whether immediately or at a future period, whether in possession or in reversion.

21. Lord Holt has thus explained the nature of a lease in reversion:—"In the most ample sense, that is said to be a lease in reversion, which hath its commencement at a future day, and then it is opposed to a lease in possession: for every lease that is not a lease in possession, in this sense is said to be a lease in reversion." (*b*)

*In a more confined sense of the term a lease in reversion signifies a lease to begin from the determination of a lease in being, in which sense all leases, where there is a particular estate outstanding, are leases in reversion. And so is the term "*reversion*" to be taken where mention is generally made of leases in possession, under a power; for otherwise a tenant for life, with power to make leases in reversion, might make a lease to commence fifty years after his death. *165

22. It was formerly held that a lease made to commence from the date, or the day of the date, was a lease in reversion.[1] But this doctrine has been altered by the following determination.

23. A tenant for life, with power to make leases for twenty-one years in possession, and not in reversion, made a lease to his daughter, to hold from the day of the date of the indenture for twenty-one years. Lord Mansfield, after stating all the authorities on this subject, delivered his opinion that "*from*" might, in

(*a*) Doe *v.* Rendle, 3 Mau. & Sel. 99. (*b*) 1 Com. R. 39.

[1] As to the rules of excluding or including the day of the date, in the computation of time, see *supra*, ch. 5, § 17, note.

the vulgar sense, and even in strict propriety of language, mean either inclusive or exclusive: that the parties necessarily understood, and used it in that sense which made the deed effectual. That courts of justice were to construe the words of parties so as to effectuate their deeds, and not to destroy them; more especially when the words themselves abstractedly might admit of either meaning. It was therefore adjudged, that the lease should be deemed a lease in possession, and therefore good, being warranted by the power. (*a*)

24. Where a power is given *indefinitely* to make leases, *without mentioning the time when they are to commence;* it shall be *taken strictly against the donee of the power*, and consequently be construed so as only to authorize leases in possession, and not leases in reversion.

25. Henry, Earl of Suffolk, was seised of an estate under an act of parliament, to the use of himself for life, remainder to his wife for life, &c.; with a proviso, that it should be lawful for the earl to make leases for twenty-one years. The earl made a lease for twenty-one years, and before the end of it, he made another lease to the lessee for twenty-one years, dated the 30th of March, to commence at Michaelmas following. It was adjudged a void lease, because for the time it was a lease in reversion; and if he might make a lease to commence at the Michaelmas following, he might make *it to commence twenty years after, which would destroy the effect of the settlement. (*b*)

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26. A power to make leases generally, *does not authorize the donee to make a lease to commence after the determination of a lease in being;* for it has been observed that such a lease is reversionary in the strictest sense.

27. A woman, tenant in fee-simple, levied a fine to the use of herself for life, remainder to her eldest son in tail; reserving to herself power to make leases at any time for twenty-one years, or three lives. She afterwards leased a part of the premises to A for twenty-one years, and before that lease expired, made another to A for twenty-one years, to begin after the determination of the former lease, and died. The first lease expired, and then a question arose, whether the latter lease was good under the power. It was adjudged, that it was not, for upon such power

(*a*) Pugh *v.* D. of Leeds, Cowp. 714. (*Supra*, ch. 5, § 17.)
(*b*) Sussex *v.* Wroth, Cro. Eliz. 5. 6 Rep. 33 a.

she could not make a lease to commence at a day to come, but was confined to a lease in possession, and could not convey an interest to commence *in futuro* in reversion, after another estate expired; but the law would adjudge upon a general power to make leases, without saying more, that they ought to be leases in possession; for if under such a power, a lease might be made upon a lease, the donee might, by making infinite leases, detain those in remainder out of possession forever, which would be contrary to the intent of the parties, and against reason. (*a*)

28. It is immaterial whether a lease made to commence upon the determination of a lease in being, be made to the person who holds under the former lease, or to a stranger; it is equally reversionary.

29. Lord Bath, being tenant for life, with power to grant leases for any number of years, not exceeding forty years in possession and not in reversion, demised the premises in question to B. Timbrel for sixty years, which term became afterwards vested in Colonel Lambert. On the 30th of April, General Pulteney, who was then seised of the premises for life under the same settlement, made a lease to Colonel Lambert for thirty-four years, to commence at the expiration of the former lease for sixty years. It was argued, that this was a reversionary lease to take effect after the determination of another lease then in existence, and which had at that time twenty-six years to run. The circumstance of the second lease being granted to the same lessee *and to commence after the expiration of the former lease, could not vary the case, and operate so as to make it a continuance of the former lease; it must therefore be considered as a reversionary lease, as much as if it had been granted to a different lessee. The Court held the lease to be void. (*b*) *167

30. George Allan being tenant for life, with a power to make leases in possession, and not in remainder or reversion or expectancy; by indenture of lease, bearing date and executed the 29th March, 1798, demised the lands in question to Calvert, to hold the same in manner following, viz., the tillage ground from the 13th of February then last past, the pasture ground from the 5th

(*a*) Slocomb *v.* Hawkins, Yelv. 222. 1 Brownl. 148. Duke of Bucks *v.* Antrim, Sid. 101.
(*b*) Doe *v.* Cavan, 5 Term R. 567.

April then next, and the residue from the 12th of May also then next, for the term of twelve years, from the said respective days. The periods mentioned in the *habendum* of the lease were the usual periods of entry by tenants on arable, pasture, and meadow grounds, in the country where the lands lay. Calvert, the lessee, on the day of the date of the lease, held the premises as tenant from year to year, and which tenancy, according to the custom of the country, would determine on the 13th of February, the 5th of April, and 12th of May, in the year 1798. It was contended, that this was a lease in reversion, and not in possession, except as to the tillage ground; and the lease being entire, if void for part, must be void for the whole. The Court was of this opinion, and observed, that the cases cited where leases had been holden void for excess only, did not apply, for this was no question of excess; in those cases, by retrenching the excess, a lease might be brought within the terms of the power; but no limitation of the term would make a lease in reversion a lease in possession. (*a*)

31. When lands are leased out for lives, or years, and afterwards *limited in strict settlement*, with a power to the tenant for a life to make leases generally, he *may make a reversionary lease*, to commence upon the determination of the subsisting lease; for otherwise the tenant for life might never have an opportunity of exercising his power.

32. Husband and wife made a lease of part of the wife's estate for twenty-one years, rendering the accustomed rent. Afterwards it was enacted by parliament, that the husband should have the lands in lease and the rent for his life, remainder to his wife; and that all leases and grants thereof made and to
168* be made, by the *husband by indenture for three lives or twenty-one years, reserving the accustomed rent, should be good. The husband, after eight years of the lease expired, (reciting the former lease,) demised the land for twenty-one years next after the end of the first twenty-one years, reserving the usual rent. It was held by Manwood and Dyer, that the lease was good; but Mounson was of a different opinion. And in a note it is said that Mounson's was the better opinion. But

(*a*) Doe *v.* Calvert, 2 East, 376. Bowes *v.* East Lond. Water Works Co. 3 Mad. 375. Jacob, 324. Doe *v.* Heirn, 5 M. & S. 40.

the validity of such a lease was established in the following modern case. (*a*)

33. Thomas, E. of Coventry, was tenant for life of the reversion of lands, which were leased out for lives; with a power to make leases of any part thereof for twenty-one years, or one, two, or three lives; so as there were not in any part of the premises so leased, at any one time, any more or greater estate or estates than for twenty-one years, or for three lives, or for any number of years determinable upon three lives; the earl made several leases for 99 years, determinable in one instance on one life, in others on two lives, to commence from the death of a remaining life in the former leases. And upon an issue directed out of Chancery, to try the validity of these leases, the Court of King's Bench was of opinion, that they were good under the power. (*b*)

34. But where, in a settlement of an estate in reversion, a power is expressly given *to make leases in possession;* a lease in reversion will not be supported.

35. A father and son made a lease for ninety-nine years, if three persons or any of them should so long live. Afterwards they settled the reversion to the use of the father for life, with a power to make leases for ninety-nine years, or three lives in possession, or for two lives in possession and one in reversion, or for one life in possession and two in reversion. The father, during the continuance of the first lease, made a lease for life; and the question was, whether the latter lease, being made while the lives in the former lease were in being, was authorized by the power. Justice Keeling inclined, that the lease was within the power; for the settlement being only of the reversion, a present lease of the reversion was within it. Windham and Twisden held, that the settlement being of a reversion, if the words of the power had been general, to make leases, a lease in reversion had been within it; but the power being expressly to make leases in possession, this lease in reversion was not within it. (*c*)

*36. Where a person has a general power to make *169 leases, he *may make a concurrent lease, to commence immediately;* although the lands are then held under an existing

(*a*) Mar. of Northampton's case, 3 Dyer, 357 a. Fox *v.* Prickwood, Cro. Jac. 347.
(*b*) Coventry *v.* Coventry, Com. R. 312.
(*c*) Opey *v.* Thomasius, T. Raym. 132.

lease, made either by a former proprietor, or the person making such lease.

37. It was adjudged by the Court of Common Pleas, about 17 Cha. II., that if a man had power to make a lease for years, where there was another lease in being, there, if he made a lease to commence *in præsenti*, the power was well executed; and the second lease should continue as long as it might, taking effect in possession after the determination of the first lease. (*a*)

38. A person devised lands to his son for life, with a proviso, that if he made any alienation, &c., otherwise than a lease for twenty-one years, he should forfeit his estate. The son made a lease for twenty-one years, and a year before the expiration of that lease, he made another lease for twenty-one years, to begin immediately. The question was, whether the last lease was authorized by the power. It was said, that although the tenant for life could not, under the power, make leases in reversion, for then he might charge the inheritance *in infinitum*, yet such a lease as this was good, for it was to begin presently, so that the inheritance could not be charged in the whole for more than twenty-one years. And the Court seems to have been of that opinion; but no judgment appears to have been given. (*b*)

39. A person was tenant for life, with power to demise the lands to any person or persons in possession, but not by way of reversion, or future interest, for the term of twenty-one years absolute, or any lesser absolute term, or for any term or number of years determinable upon one, two, or three lives. The lands were let for a year, and then the tenant for life, by indenture, reciting his power, demised them for ninety-nine years, if the lessee should so long live; and directions were given to the tenant for a year to pay his rent to the lessee, which he accordingly did. It was contended, that this was a lease in reversion, and therefore void under the power. But Lord Mansfield said, it was good as a concurrent lease, upon the authority of the case of Read *v.* Nash. (*c*)

40. With respect to leases in reversion, it has been already stated, that a power to make leases in reversion only extends to

(*a*) Berry *v.* Riche, Hard. 412.
(*b*) Read *v.* Nash, 1 Leon. 147. See Roe *v.* Prideaux, 10 East, 158, 184.
(*c*) Goodtitle *v.* Funucan, 2 Doug. 565. *Ante*, s. 38.

leases to commence from the determination of leases in being; and does not enable the donee of such a power to make leases *to commence generally at any future period. And *170 Lord Holt says, the expression "*to lease in reversion*," has a different signification in the same conveyance, when applied to *leases for lives in reversion*, from that which it bears when applied to *leases for years*. For as a lease for lives cannot, strictly speaking, be made to commence *in futuro*, it will, in that case, be intended of a concurrent lease, or a lease of the reversion; that is of the lands then in lease, to commence in possession after the determination of the then existing lease, though it commences in interest presently, and is concurrent with the existent lease. And if a power enabled any one to make leases in reversion, as well as in possession, he could not make a lease in possession and another lease in reversion of the same land; but his power to make leases in reversion should be confined to such parts of the land as were not then in possession. (*a*)

41. It has been already stated, that a general power of leasing only authorizes a lease in possession. But where a power *expressly enables* a person to make leases *as well in possession as in reversion*, a lease in reversion will then be good.

42. William Whitlock being tenant for life, with power to make leases as well in possession as in reversion, demised the premises for ninety-nine years, to commence after the death or determination of the estate of the prior tenant for life; and this was held to be a good lease under the power. (*b*)

43. IV. The *fourth restriction* usually inserted in powers of leasing, relates to the *duration of the lease*. The *usual practice* is, to *restrain* tenants for life from making leases for a *longer term than twenty-one years;* except in those countries where lands are usually let for lives; for there the tenant for life is allowed to grant leases for one, two, or three lives. And where a power is given to make leases for three lives, it will be well executed by a lease for three lives, and the life of the longest liver of them, because that is the same thing. (*c*)

44. A distinction is taken in Whitlock's case between a power to make leases which in the beginning is general, absolute,

(*a*) 1 Com. R. 39. *Ante*, c. 4.
(*b*) Whitlock's case, 8 Rep. 69.
(*c*) Alsop *v.* Pine, 3 Keb. 44.

affirmative, and indefinite; as to make a lease or leases, grant or grants, &c. without any restriction, and then a proviso of correction added, namely, that such lease or leases, grant or grants, &c. shall not exceed the number of three lives at most, or twenty-one years, which clause is negative, and quali-
171 * fies the * generality of the power; and where the power is particular, entire, and affirmative, to make leases for three lives, or twenty-one years. For in the first case, the donee of the power may make any lease or grant, provided it does not exceed the utmost extent of interest that the power warrants: as if a person has a power to make leases, provided they do not exceed the number of three lives or twenty-one years; there he may make a lease for ninety-nine years, if three lives shall so long live, for that does not exceed the number of three lives, but in truth is less. But in the second case, he must pursue the power, which is particular and entire; as if a person has a power of making leases for three lives, or twenty-one years, he cannot make a lease for ninety-nine years, if three lives shall so long live. (*a*)

45. A person was tenant for life, with power to lease for one, two, or three lives, in possession; or in reversion for one, two, or three lives, or thirty years, or for any number of years determinable on one, two, or three lives. It was resolved, that he might make a lease in reversion for thirty years absolutely, by virtue of his power; because the limitations and restrictions were disjoined, and the latter part was carried on by way of enlargement of the power. (*b*)

46. A power to grant leases, provided they do not exceed *thirty-one years*, or *three lives*, will warrant a lease for three lives, or thirty-one years, whichever shall last longest.

47. Lord Netterville, being tenant for life, with power to lease for any term, not exceeding thirty-one years, or three lives, to commence in possession, made a lease for the lives of three persons, and the longest liver of them, or for the term, time, and space of thirty-one years, which should last longest. On a question, whether this lease was warranted by the power, it was determined by the Court of Exchequer, and also by the

(*a*) 8 Rep. 70 b.

(*b*) Winter *v.* Lovedore, *ante*, s. 15. 2 Salk. 537. See Sugd. P. 469, ed. 5.

Court of Exchequer Chamber in Ireland, that the lease was good. On a writ of error to the House of Lords in England, the Judges were directed to deliver their opinion on the following question: "Whether the lease stated in the special verdict could be supported as a good execution of the power, or whether such lease was absolutely void." And they delivered their unanimous opinion, that the lease might be supported as a good execution of the power; whereupon the judgment was affirmed. (*a*)

*48. [Under a power to lease for twenty-one years, a lease may be granted for a less term.] (*b*) *172

49. V. The *fifth restriction* usually inserted in powers of leasing, relates to *the rent directed to be reserved.* The common practice formerly was to require that the ancient usual and accustomed rent should be reserved, in order that the persons in remainder might not be prejudiced by such leases.

50. Lord Holt was of opinion, that the words "*ancient and accustomed rent,*" meant that rent which was reserved when the power was created, if a lease were then in being; or that which was last before reserved, if no lease were in being. For he who created such a power, intended no more than that the tenant for life should not be able to put the estate in a worse condition than it was in when the power was created. Lord Cowper doubted as to this point, and suggested, that if lands were leased once at a greater, and twice at a lesser rent, he should consider the rent of the former lease to be the ancient rent; for the last lease might be made by the person who had the fee, and who was not bound to reserve the ancient rent, but might let it for nothing if he pleased. He also said, this rule could not apply to lands anciently demised, where fines had been taken; for there the rents were more or less, as the fines were higher or lower. (*c*)

51. Where lands have been usually leased for lives, and the usual profits made by fines, a tenant for life under a settlement, with a power to lease, reserving so much or more yearly rent as had been received for the premises within twenty years then last past, will not be obliged to let the lands at a rack rent, but may

(*a*) Commons *v.* Marshall, 6 Bro. Parl. Ca. 168.
(*b*) 1 Keble, 347. 3 Keble, 745. 3 M. & S. 382.
(*c*) 3 Rep. in Cha. 66.

demise them, reserving the usual fines and rent; as a lease at a rack rent may be inconsistent with the nature of the estate. (*a*)

52. Where a power required that two thirds of the improved value should be reserved as a rent, the reservation might formerly have been made in the terms of the power. But in general it now seems necessary that the precise sum intended to be reserved should be specified in the lease; for otherwise the persons in remainder may be put to infinite trouble and expense, in proving the value of the lands demised, or the *quantum* of the ancient accustomed rents. (*b*)

53. In a settlement made on the marriage of Lord Brandon, eldest son of the Earl of Macclesfield, a power was given
173* to the *tenants for life to lease all the premises; so as upon every such lease, of such parts of the premises as had been anciently and accustomably demised, whereof fines had been usually taken, the old, usual, and accustomed yearly rent, or rents, or more, should be yearly reserved and made payable; and so as upon every lease of such part of the premises as had not been usually let, and for which there had not been any fine or fines usually taken, there should be reserved and made payable the most and best improved yearly rent that could be reasonably had or obtained for the same. (*c*)

A tenant in possession under the settlement, being desirous to make leases for the benefit of his family, and seised with a sudden indisposition, when he had no rent-rolls or old leases, made a lease of all the lands which had been usually letten, and fines taken for the same, yielding and paying *the several and respective old accustomed rents reserved and payable for the same.* And also another lease, whereby part of the premises, for which fines had not been usually taken, and of which there was then no lease for years, or for any life in being, were demised, yielding such sum and sums of money as should amount to the best and most improved yearly rent that could be reasonably had and obtained for the same.

A question having arisen on the validity of these leases, the latter of them was given up by the lessees; a reservation of the most improved rent being so uncertain, that it could not be sup-

(*a*) Right *v.* Thomas, 3 Burr. 1441.
(*b*) Clere's case, 4th point, 6 Rep. 17. Audley *v.* Audley, 2 Rep. in Cha. 82.
(*c*) Hamilton *v.* Mordaunt, 6 Bro. Parl. Ca. 145. Orby *v.* Mohun, 3 Vern. 531.

ported. And as to the former, after a hearing before Lord Cowper, assisted by Lords Holt and Trevor, it was held not to be warranted by the power, contrary to the opinion of Lord Holt.

On an appeal to the House of Lords, * after hearing the * 175 opinion of the Judges upon a question proposed to them—
" Whether the power in the settlement to make leases was well executed," the decree was affirmed.

54. Where lands *have never been leased*, and a power is given to demise them, reserving such rent as was reserved for them within the two preceding years, a lease may be made of them, reserving any rent the lessor pleases. (*a*)

55. Where a power was given to a tenant for life to make leases, with fine or without fine, rendering such rents and services as he should think fit; and he made a lease without rendering any rent; the lease was held good. (*b*)

56. In modern times it has been usual to require that "*the best and most improved rent*" *be reserved.* And it has been resolved that, in such a case, the *best rent means the best rack-rent* that can be reasonably required by a landlord; taking all the requisites of a good tenant, for the permanent benefit of the estate, into the account. (*c*)

57. Where the power requires the *ancient rent* to be reserved, it *must be made payable at the same time*, and in the *same manner*, as the former rent. Therefore the reservation of rent half yearly, where it was formerly reserved quarterly, will make the lease void; because it is *ad nocumentum* of the persons in remainder, it being more profitable for them to have it paid * quarterly, than half yearly; and all the beneficial quali- * 176 ties of the rent ought to be preserved. (*d*)

58. The rent must also issue out of the *same land.* Therefore it was resolved in Mountjoy's case, that if two several farms, which had formerly been demised separately, were included in the same lease, reserving one rent, though equal to the two ancient rents; or if part of a farm was let, reserving a rent, *pro ratâ*, it would be void.† And the stat. 39 & 40 Geo. III. c. 41, does not extend to this case. (*e*)

(*a*) Cumberford's case, *ante*, s. 18. (*b*) Talbot *v.* Tipper, Skin. 427.
(*c*) Doe *v.* Radcliffe, 10 East, 278.
(*d*) Mountjoy's case, 5 Rep. 3, 4th Resol. Doe *v.* Wilson, 5 Barn. & Ald. 363.
(*e*) *Ante*, c. 5.

[† In the above case, of Doe *v.* Wilson, the Court of King's Bench determined in

59. An improvement in the estate will not be considered such an alteration as to vary the rent, by making it issue out of other hereditaments than those contained in the power.

60. Thus, where a tenant for life, with power to make leases, reserving the ancient rent, having built a new house upon the land, made a lease, reserving the ancient rent; it was contended, that this could not be said to be the ancient rent, because part of it issued out of the new house; but the Court held the rent to be well reserved. (*a*)

61. The rent must also be reserved in such a manner, that all the persons in remainder, claiming under the settlement by which the power was created, may be enabled to compel payment thereof.

62. VI. The *sixth restriction*, usually inserted in powers of leasing, relates to the *clauses and covenants* directed to be inserted in such leases. And it is a general rule, that all those clauses, reservations, and covenants required by the power, *must be inserted;* otherwise the lease will be *void* against the remainder-men, and the reversioner.

63. The Duke of Montague was tenant for life, with power to lease, reserving the ancient usual and accustomed rents, heriots, boons, and services. In the former leases the tenants covenanted to keep in repair; and that covenant was omitted. Lord Hardwicke was of opinion that the covenant was a boon, and beneficial to the remainder-man, and held the leases void for want of it; he took some days to consider, and declared he 177 * was * clear upon the argument, but took time because there was no case in point. The more he thought of it, the more he was convinced. The principle he rested upon was, that the estate must come to the remainder-man in as beneficial a manner as the ancient owners held it. (*b*)

64. The *omission of a covenant for payment of rent* will also vitiate a lease made under a power. For a mere reservation of rent does not make it payable till entry, and therefore it in fact

(*a*) Read *v.* Nash, 1 Leon, 147.

(*b*) Cardigan *v.* Montague, cited 1 Burr. 122. Sugden on Powers, App. 13, ed. 5.

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opposition to the resolution in Mountjoy's case, considering that, in that case, it was not necessary to decide the point; and they held that, under a power in the Earl of Shrewsbury's Act to grant leases reserving the usual and accustomed rents, the lands might be divided, and rents reserved *pro rata*.—*Note to former edition.*]

may not be payable during the term; besides, if there be no covenant to pay the rent, the lease may be assigned to a succession of beggars. And the *omission of a clause of reëntry* will also invalidate a lease of this kind; for if such a clause be not inserted, the ground may be unoccupied without a sufficient distress upon it; so that the remainder-man can neither have his rent, nor his land. (*a*)

65. It has been determined by the Exchequer Chamber, in a late case, that where a power required, in the leases to be made under it, a proviso for reëntry on non-payment of the rent, the power was not well pursued by a proviso of reëntry, if the rent was in arrear for fifteen days. But this judgment was reversed in 1821 by the House of Lords. (*b*)

66. As the omission of a usual covenant will vacate a lease, so the *introduction of an unusual covenant*, on the part of the lessor, will have the same effect.

67. A person having a leasing power, reserving usual and reasonable covenants, demised a house, with a covenant, that in case the premises should be blown down, or burned, the lessor or his assigns, or the persons who for the time being should be entitled to the inheritance, should rebuild them, otherwise the rent should cease. The jury found, that this was an unusual and unheard of covenant, on the part of the lessor; and it was adjudged that the lease was void. (*c*)

68. If, however, the covenants in a lease made under a power, be upon the whole such as place the parties upon the same footing as under former leases, their differing in trifling circumstances will not invalidate the lease. (*d*)

69. In the case of Goodtitle *v.* Funucan, it was objected that the covenants were not so beneficial to the remainder-man, as those in the ancient leases; by one of which the tenant covenanted to pay half the land-tax, and by the other, the lessor * covenanted to free the tenant from tithes, and all * 178 church dues; whereas, in the former leases, the tenants covenanted to pay all duties and taxes, except the land-tax.

(*a*) 1 Burr. 125.

(*b*) Doe *v.* Smith, 1 Bro. & Bing. 97. 5 M. & S. 467. 2 Brod. & Bing. 473. Doe *v.* Wilson, 5 Barn. & Ald. 363. 3 Mad. 375.

(*c*) Doe *v.* Sandham, 1 Term R. 705.

(*d*) Doe *v.* Bettison, 12 East, 305.

Church dues were by law particularly chargeable upon the occupier. The Court said, the power did not mention covenants; and that what was thrown on the landlord was compensated by what was paid by the tenant. (*a*)

70. It is laid down in Mildmay's case, that although a power of leasing may be reserved in a declaration of uses of a fine or recovery, yet that *no such power can be reserved in a bargain and sale*, or *covenant to stand seised;* for as uses may be raised on a fine or recovery, without any consideration, therefore a use will arise to the lessees, without consideration; and the former estates being raised without consideration, may be defeated without consideration. But as no uses can arise on a bargain and sale, or covenant to stand seised, without consideration, therefore no use can arise to the lessees; for where the persons are altogether uncertain, and the terms unknown, there can be no consideration; so that the former estates, which were raised upon consideration, cannot be defeated by such leases. (*b*)

(*a*) *Ante*, s. 39.

(*b*) 1 Rep. 176. Poph. 81. Cro. Jac. 181. Jenk. 247. See Sugd. Pow. 123, ed. 5.

CHAP. XVI.

OF POWERS OF SALE AND EXCHANGE.[1]

SECT. 1. *Origin and Nature of.*
2. *What Acts they do and do not authorize.*
SECT. 3. *How affected by the Rule against Perpetuities.*

SECTION 1. *Powers of sale and exchange* are usually inserted in settlements of real estates, whether by deed or will, for the purpose of affecting those improvements of the settled property which would not otherwise be attained, on account of the partial interests of the tenants for life, and the suspense or minority of the objects who may ultimately become entitled under the limitations. They are given in various forms, sometimes to the trustees, with the consent of the tenants for life; sometimes to the tenants for life, with the consent of the trustees; at others to the trustees, with the consent of the tenants for life, and after their death at the discretion of the trustees, or with the consent of the persons for the time being entitled in the actual possession of, or entitled to the rents and profits, under the limitations of the settlement or will, if such persons are of age, if not, of their guardians.

2. In the recent case of Howard *v.* Ducane, it was decided, that under a power of sale and exchange vested in the trustees, with the consent of the *tenant for life*, the latter *might become the purchaser* of the settled estates, or, in exchange for them, *give estates of his own* to which he was absolutely entitled. (*a*)

3. In Abell *v.* Heathcote, it was decided that a power of sale and exchange authorized a partition; but in M'Queen *v.* Farquhar, Lord Eldon intimates a doubt as to the propriety of that decision, unless it could be supported on the words of the power "or other equivalent interest in manors," &c. (*b*)

(*a*) Turn. & Russ. 81. (*b*) 4 Bro. C. C. 278, Belt's ed. n. 2 Ves. 98. 11 Ves. 467.

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[1] See, on this subject, 2 Sugd. on Pow. ch. 18, p. 481–520, 6th ed.

4. In the latter case, his Lordship decided that a simple
180* power * of sale did not authorize a partition, whatever a power of sale and exchange might do.

The subject was discussed in the recent case of Attorney-General *v.* Hamilton, but it does not remove the doubt attending the decision of Abell *v.* Heathcote. It would appear to be the prevailing opinion that the partition may be effected by mutual sales. (*a*)

5. It seems to be clearly admitted that a *power to make partition* does not authorize a sale; and Lord Eldon is stated, by Mr. Belt, in a note to Abell *v.* Heathcote, to have said, on the 25th of July, 1820, that he was then of opinion "that a power to exchange ought not to be held to include a power to make partition." Neither will a simple *power of exchange* authorize a sale.

6. It was observed, in a former page, that tenant for life, without impeachment of waste, is not entitled to the timber on the estate, until it is actually felled; consequently, he cannot convey it to another, separate from the land. Where, therefore, such tenant for life, in the exercise of a power of sale and exchange, sold the timber separately, received the purchase-money for it, and conveyed it by a separate deed to the purchaser, the land being conveyed by a separate deed exclusive of the timber, it was held to be an invalid exercise of his power, and that equity could not relieve the defective execution. (*b*)

7. This occurred in the recent case of Cockerell *v.* Cholmeley. There, lands were devised to a trustee and his heirs to the use of A for life, without impeachment of waste, with divers remainders over; and a power was given to the trustees, with the consent of the tenant for life in possession, to sell the property, or any part of it, and to lay out the money in the purchase of other lands to be settled to the same uses, and, in the meantime, to invest it in the public funds, and for the purposes of such sale to revoke the original uses, and appoint new uses. A contract was entered into for the sale of the estate for £13,400, exclusive of the timber, which was to be taken at a valuation; and it being conceived that the tenant for life, without impeachment of waste, was entitled to receive for his own benefit the amount of the valuation

(*a*) 1 Mad. 214. 2 Ves. 101. 4 Bro. C. C. 285. Sug. P. 485, 5th ed. Ib. 484.
(*b*) Vol. I. p. 128.

of the timber, a deed was executed, by which he, in consideration of £2448, conveyed the timber to the purchaser; and the trustee, in consideration of £13,400, conveyed the land exclusive of the *timber. Many years afterwards, the tenant for *181 life, being advised that he was not entitled to the amount of the valuation of the timber, transferred to the trustee as much three per cent. stock as £2448 would have produced at the time of the sale. After the death of A, the next remainder-man, though he had concurred in proceedings, in which the fund produced by the sale was treated as applicable to the purposes of the testator's will, brought a writ of *formedon*, and obtained judgment, on the ground that the power of sale was not well executed. It was decided that a court of equity could not relieve against that judgment. (*a*)

8. In a former section, it was observed that a power of sale is sometimes given to the trustees, with the consent of the tenants for life, and after their decease, at the discretion of the trustees generally, or with the consent of the person or persons for the time being entitled in possession under the limitations of the deed or will creating the power.

9. The case of Ware *v.* Polhill has given rise to the question, whether such a power is not void, as not confined within the *rule against perpetuities*. It is at least, however, questionable whether it was the intention of the learned Judge who decided that case, to have sanctioned the doubt in reference to powers of sale and exchange.

10. In the case of Ware *v.* Polhill, the testator devised his freehold and copyhold estates to A for life, remainder to trustees to preserve, remainder to his first and other sons in tail, with remainders over; and he bequeathed leaseholds to trustees upon trust, after paying the rents reserved and the fines and expenses of renewal, to pay the remainder of the rents and profits to the person or persons who, under the limitations thereinbefore contained, should from time to time be entitled to the rents of the freehold and copyhold estates. The trustees were then empowered at any time thereafter, with the consent of the person or

(*a*) 3 Russ. 565. 1 Russ. & M. 418. S. C. 3 Bing. 207. 5 Bing. 48. 10 Bar. & Cr. 564. And see also, 2 Swan. 149. 3 Swan. 699.

persons who should as aforesaid be entitled to the rents of the freeholds and copyholds, or in case such person or persons should be a minor or minors, then at the discretion of the said trustees, to sell the leaseholds, and to invest the money in the purchase of freeholds or copyholds, to be settled to the same uses as the testator had before given and subjected the freeholds and 182* copyholds devised; and until such *purchase, the money to be invested in real or government securities, and the interest paid to the persons for the time being entitled to the rents of the freehold, copyhold, and leasehold estates. The power was not exercised. (*a*)

A died, leaving a son, who died an infant; his administratrix claimed the leasehold property, on the ground that it had vested in the infant absolutely on his birth. Against this claim it was urged that the testator's intention was, that all his property, not real, should be converted into realty, and be limited in strict settlement, and the trustees ought to have sold all the leasehold estate accordingly; that the intention was to provide for the issue male, and that the leaseholds, while unsold, should go with the freehold, as far as the rules of law and equity would permit, and not vest in any tenant in tail, so as to be transmissible, unless such tenant in tail attained the age of twenty-one. Lord Eldon held the administratrix of the infant tenant in tail, absolutely entitled; and observed that, as to the leasehold, the power of sale was void, for it might travel through minorities for two centuries; and if it was bad to the extent to which it was given, it could not be modelled to make it good; he thought the soundest rule was, that the power was bad.

11. It has been truly observed, by Sir Edward Sugden, that the point decided by the last case was, that, where a leasehold estate is settled as a real estate, but so as to vest absolutely in a *quasi* tenant in tail, a power to defeat his estate by selling the property and buying a real estate to be re-settled, is void. The same learned author continues: "In practice, the case has been treated as an authority that the common power of sale and exchange is void as too remote, if it be not expressly confined to lives in being, and twenty-one years afterwards. But it is clear the Lord Chancellor did not mean to impeach the validity of

(*a*) 11 Ves. 257.

such powers; and he proceeds to show that the objection to the power in Ware *v.* Polhill, was not only that it involved a change in the nature of the property, but a devesting of the interest otherwise absolutely vested in an infant, *quasi* tenant in tail; while the usual power of sale authorizes merely the alienation of the property, without affecting the interests of the persons beneficially entitled. (*a*)

12. The above objection in reference to powers of sale over estates in strict settlement, was generally considered not tenable, * inasmuch as the tenant in tail, attaining twenty- *183 one, might by recovery acquire the absolute ownership, discharged of the power; but where the limitations in the settlement were to the children of the tenants for life in fee, the prevailing opinion of the profession was, that such a power of sale was questionable, inasmuch as the power was not limited within the rule against perpetuities; so that when the objects, entitled under the limitations, attained twenty-one, they could not by any means convey the estate discharged of the power, however inconsistent such a dry power, existing in a third person, might be with the ownership in fee. This objection, frivolous as it has been considered by some, has been the occasion of embarrassing many titles, and has given rise to the three following decisions: —

13. In Biddle *v.* Perkins, Michael Hopkins, by his will, dated December, 1802, devised certain estates to John Partridge, Thomas Loggan, and Joseph Biddle, their heirs and assigns, to the use of William Parsons for life, remainder to John Parsons for life, remainder to the said trustees and their heirs, to preserve contingent remainders, remainder to the use of the first and other sons of the body of the said John Parsons successively, in tail mail, remainders over for life and in tail, remainder over to William Parsons in fee; and in the said will was the following power of sale and exchange: "And I do hereby will and direct that it shall be lawful for the said John Partridge, Thomas Loggan, and Joseph Biddle, and the survivors and survivor of them, and the heirs of such survivor, at any time or times after my decease, at the request and with the consent of the person or persons who shall, for the time being, be entitled in possession to

(*a*) Sugd. Pow. 5th ed. 149. (2 Sugd. Pow. 493, 6th ed.)

my aforesaid manors, &c. under and by virtue of the limitations hereinbefore contained, and in case such person or persons shall be an infant or infants, then at the request, &c. of his or their guardian or guardians, to make sale, &c. of all or any part of the said manors," &c. The power then proceeded in the usual form. In 1828, the plaintiffs, who were heirs at law of Joseph Biddle (who survived his co-trustees,) sold the devised premises by auction to the defendant, who, being advised that there was some doubt as to the validity of the power of sale, declined completing his purchase without the sanction of the Court of Equity. The plaintiff, therefore, in Trinity Term, 1828, filed his bill for a specific performance; and on the coming in of the answer, 184 * the *usual order for the reference of the title was obtained, and the Master (Cox) reported in favor of the title. To this report an exception was taken, alleging that the power of sale was not valid, inasmuch as its operation was not confined within the rules against perpetuities. The point came on for decision before Sir Launcelot Shadwell, V. C., on the 15th of April, 1829, who overruled the exception. Sir E. Sugden, for the plaintiff, and Mr. Stinton, for the defendant. The suit was an amicable one, and the counsel for the defendant was instructed not to support the exception very strenuously, but merely to state the case fairly to the Court for its opinion. (*a*)

14. Again, in the Earl of Powis *v.* Capron, by the marriage settlement of Mr. and Mrs. Storey, in 1819, certain premises were conveyed to the Earl of Powis and Henry Clive, and their heirs, to the use (after the expiration of a life-estate which expired before the bill was filed) of Mr. Storey, for life; remainder to the said trustees to preserve; remainder to Mrs. Storey, for life; remainder to all and every the children and child of the marriage, as Mr. and Mrs. Storey, or the survivor of them, should appoint; and in default of appointment, to the use of such child or children equally, if more than one, as tenants in common, and of the heirs of the respective bodies of such children respectively issuing, with cross remainders between them; and if but one child, then to the use of such child and the heirs of his or her body; and in default of such issue, to such uses as Mrs. Storey should appoint, with the ultimate limitation to her heirs and assigns.

(*a*) MS. reported also, 4 Sim. 138. Reg. Lib. A. 1828, Fo. 1456.

The settlement contained the following power of sale and exchange:—"Provided, &c. that it shall be lawful for the said Earl of Powis and H. Clive, and the survivor of them, his heirs, and assigns, from time to time, and at all times at the request and by the direction in writing of the person or persons who, under the limitations hereinbefore contained, shall for the time being be entitled to the possession of, or to the receipt of, the rents and profits of the premises hereinbefore released, or if such person or persons be under age, with the consent of his or her guardian during minority, to make sale, &c. of the said settled premises." The power contained the usual provisions. The trustees made a sale under the power; but the title was objected to on the ground mentioned in the preceding case; and the purchaser refusing to complete, Mr. and Mrs. Storey and *their trustees, the Earl of Powis and H. Clive, in *185 March, 1829, filed their bill to compel a specific performance. The usual reference for title being obtained, Master Cross reported in favor of the title, to which report an exception was taken. This exception came on to be argued on the 5th day of May, 1830, before Sir John Leach, M. R: The defendant's counsel, Messrs. Tinney and Morley were heard in support of the exception; but his Honor, without hearing the plaintiffs' counsel, expressed himself strongly against the objection; he declined, however, to decide the point, and added, if the defendant insisted on the objection, the matter must be determined at law. The order made directed a case at law, if the defendant chose to take one; and if he did not, that the objection be overruled. The defendant declined taking a case, and subsequently completed his purchase. (*a*)

15. Upon searching the Register's Book, the Editor finds that the case of Biddle *v.* Perkins is mentioned very shortly; the facts are not given, and the entry states generally that the exceptions to the Master's report were overruled. The facts of the case of the Earl of Powis *v.* Capron are however given, and the objection fully stated in the Register's Book, and with which the above statement has been compared. It is stated generally that the objections to the Master's report in favor of the title were overruled.

(*a*) MS. also reported, 4 Sim. 138, note. Reg. Lib. A. 1829, Fo. 2919.

16. The two preceding authorities did not remove the objection, where the limitations are to the objects of the settlement or will in fee, and not in tail. The question, however, arose in the following case, sent by Sir John Leach, M. R., for the opinion of the Court of Exchequer, and which in part removes the objection.

There, by settlement in 1828, on the marriage of Edward Williams and Susannah, his wife, freehold estates were settled to the husband for life, S. W.; remainder to trustees during his life to preserve, remainder (after limiting a rent charge to Susannah for life) to such children or issue of the marriage as the husband and wife should jointly appoint, and in default thereof, as the survivor should appoint; and in default of any appointment, to the children of the marriage, their heirs and assigns forever, in equal shares as tenants in common, and with a clause for survivorship in case of the death of any child under twenty-
186* one *and without leaving issue. And for default of such issue to the husband in fee. The settlement contained a power, authorizing the trustees or trustee for the time being, with the consent of the husband and wife, or the survivor, and after the death of the survivor, *at the discretion of the trustees or trustee for the time being to sell all or any part* of the settled estates. The settlement also contained a power for the husband during his life, and after his death for the trustees or trustee for the time being, "during the minority of any child or children of the marriage, who by virtue of the limitations therein should be entitled to an estate of inheritance," to lease. (*a*)

The trustees, with the consent of the tenants for life, contracted for the sale of the settled estate, and the question arose, whether the power of sale was void, as overriding an estate in fee, and not restricted within the limits of the rule against perpetuities. It was argued in support of the power, 1st, That a power of sale was not within the mischiefs of the rule, for such a power assists instead of restraining alienation; 2dly, That if the power were within the mischief, then it was divisible, in the nature of two distinct powers, first, a power to the trustees during the lives of the tenants for life, with their consent, and secondly, a power to the trustees after the death of the tenants for life; and that it

(*a*) Boyce v. Hanning, 2 Crom. & J. 334.

might be good in the former instance, even if void in the latter; 3dly, That if the power was not divisible, it should be restrained to the trustees during the limits of their trust, namely, the minority of the children; and 4thly, That if it was insisted that estates and trusts might be created by virtue of the power of appointment, to have duration beyond the minority of the children, it was argued, that the power would be extinguished by the alienation. Against the validity of the power, it was insisted, that if the tenants for life should die, leaving children, and such children should die under age, leaving infant issue, the words of the power would clearly extend to such a case, or even to more than two minorities; but that even two minorities might keep the power beyond a life or lives in being, and twenty-one years. That the power could not be split into two, for it was given as one, under one limitation; the assent of the tenants for life, and after their death the discretion, being vested in the trustees, were only modifications of the way in which the same power was to be executed at different periods; that if the power was bad (as *observed by Lord Eldon, C., in Ware *v.* Polhill,) *187 to the extent in which it was given, it could not be modelled to make it good; and that if the power could not be split, it was void as within the line of the rule against perpetuities. The Judges' certificate, according to the usual course, does not give the reason for their Lordships' opinion, which was, that the trustees, with the consent of the tenants for life as required by the power, could sell and make a valid assurance of the property to the purchaser. (*a*)

17. It is to be regretted that the three preceding decisions do not set the question completely at rest. The last authority decides that the power was valid during the lives of the tenants for life; but it does not determine whether, after the death of the tenants for life, the power was void; or if not totally void, to what extent it was good, whether only during the minority of the children of the marriage. Had the sale been made by the trustees after the death of the tenants for life, and during the minority of their issue, the question, which at present must be considered unsettled, would then have arisen.]

(*a*) Smith *v.* Death, 5 Mad. 371. Badham *v.* Mee, 7 Bing. 695. West *v.* Berney, 1 Russ. & Myl. 431. Bickley *v.* Guest, Ib. 440.

CHAP. XVII.

EXECUTION OF POWERS.

SECT. 1. *May be restrained by Circumstances.*
14. *Where the Instrument is specified, it must be adopted.*
16. *A Power given generally may be executed by Deed or Will.*
21. *But it must be properly executed.*
24. *Unless the Power is collateral.*
26. *A Will executing a Power retains all its Properties.*
29. *The Power need not be recited.*
33. *But the Instrument must refer to the Estate.*
37. *A Power may be executed by several Assurances.*
40. *And at different Times.*
44. *An Appointment may be a Revocation* pro tanto.
SECT. 47. *Where a Power is exceeded, the Excess only is void in Equity.*
49. [*Otherwise at Law.*]
56. *An Appointment may give a lesser Estate.*
60. *Or direct a Sale, and appoint the Money.*
64. [*When illusory.*]
68. *Unless there are special Words.*
74. *A Power cannot be delegated.*
77. *Unless there are special Words.*
79. [*Or the Power is equivalent to absolute Ownership.*]
81. *Where an Instrument operates as an Appointment.*
89. *Effects of the Execution of a Power.*
96. *Will not defeat a prior Estate.*

SECTION 1. Powers of revocation and appointment were formerly directed to be executed by the tender of a ring, the payment of a sum of money, &c.; but in modern times they have in general been directed to be executed by deed or instrument in writing, or by will. And the *execution of these powers may be restrained* by *such collateral circumstances*, and *attended with such forms and ceremonies, as the persons creating such powers may think proper to require;* nor can a court of law dispense with the performance of them, without violating the intention of the parties.[1]

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[1] A power may be executed by any person, capable of conveying his own estate.

2. This *rule is the same*, though the power be *reserved to the original owner* or the estate; for where a person debars himself *from making any future disposition of his property, except by an act attended with certain forms, no court of law can dispense with the observance of them; for he may feel conscious of such weakness and frailty of mind, as to require that all future dispositions to be made by him should be attended with such solemnities as may effectually prevent surprise and imposition. It has therefore been settled, ever since the introduction of powers, that *all the forms* and circumstances prescribed in the deed by which the power is created, *must be strictly observed;* otherwise no revocation or appointment will take place. (*a*) *189

3. Thus, where the execution of a power of revocation and appointment was directed to be *by deed indented, to be enrolled;* it was resolved that these circumstances must be strictly complied with; for if the deed were allowed to operate as a revocation before enrolment, then it never would be enrolled. It was also resolved in the same case, that where the deed was directed to be *enrolled in a particular court*, it must be enrolled in that court. (*b*)

4. The Duke of Albemarle made his will in 1675, and thereby gave a great part of his estate to the Earl of Bath. In 1681, he made a deed of settlement, whereby, though he varied in several particulars from his will, yet he limited the greater part of his estate to Lord Bath. In this settlement the duke reserved to himself a power of revocation, by any deed or writing, to be executed by him in the presence of *six or more credible witnesses*, three whereof to be peers of the realm. In 1688 the duke made another will, attested by *three witnesses only*, whereby he revoked this settlement, and gave a great part of his estate to Mr. Monk. Upon the duke's death, Mr. Monk brought a bill in chancery, to set aside the settlement, and establish the will; and it was insisted on his behalf, that although the will might

(*a*) 8 Cha. Ca. 55, 107. 10 Rep. 144 a. Hob. 312. (*b*) Digges's case, 1 Rep. 173.

A *feme covert*, also, without the concurrence of her husband, may execute any power, whether it were conferred after or before her marriage. An *infant*, also, may exercise a power simply collateral; but not a power appendant or in gross. 1 Sugd. Pow. 213; 4 Kent, Comm. 324.

not, in strictness of law, be a revocation of the deed of settlement, the circumstances required not having been pursued, either in the number or quality of the witnesses; yet as it was made with great deliberation, (it being in proof that the draft was not completed till six months after instructions had been given for preparing it, and that Lord Chief Justice Pollexfen's opinion was taken upon it,) it ought to be deemed an effectual revocation in equity, although the circumstances required had not been strictly pursued; as they were only prescribed
190* to * prevent surprise; and it was evident there was none in this case. But it was held by Lord Keeper Somers, the two Chief Justices, Holt and Treby, and Mr. Baron Powell, that the latter will was no revocation of the former settlement, either at law or in equity; for in all cases of revocations merely voluntary, all the circumstances required by the deed creating the power, must be strictly pursued; and there was no precedent of any case in equity, in which the Court had given any aid, where both parties were volunteers. (*a*)

5. Husband and wife settled the wife's estate to the use of themselves for their lives, remainder to their first and other issue in tail male; with a power to the husband "by his last will, or any writing purporting to be his last will, *under his hand and seal*, attested by three or more credible witnesses, (if he should die before his wife, without any issue between them then living,) to charge the premises with any sum or sums of money, not exceeding £2000, to be paid to such persons as he should appoint." There was no issue of the marriage; and the husband, by his last will in writing under his hand, attested by three witnesses, but not sealed, reciting his power of charging the premises with £2000, disposed of the same among his relations. One of the questions in this case was, whether this will, not being sealed, was a good appointment under the power. (*b*)

Lord King was of opinion, that the will being duly executed, was a good appointment; but directed, for the satisfaction of the parties, as it was a matter of law, that it should be referred to the Judges of the Court of King's Bench; and it was by them held, that the will was void as a charge, for want of being sealed.

(*a*) Bath and Montague's case, 3 Cha. Ca. 55. 2 Freem. 193.
(*b*) Dormer *v.* Thurland, 2 P. Wms. 506.

The opinion of Lord King was founded on an idea that the words, under his hand and seal, referred only to the sentence immediately preceding, viz: or any writing purporting to be his last will; and not to the words, by his last will; so that the power might be executed either by a will duly attested according to the Statute of Frauds, which does not require a seal; or else by a writing purporting to be a will, under his hand and seal: but the Court of King's Bench was of opinion, that the words under hand and seal, referred to both the preceding sentences.

*6. In the case of Sayle *v.* Freeland, which was prior *191 to that of Dormer *v.* Thurland, the Court said, that equity would help in the execution of a power, in a little circumstance, when the owner of the estate had fully declared his intention to execute the power. But in a subsequent case Sir Joseph Jekyll said, this was going too far, unless there were some equitable circumstances in the case; and was contrary to what was resolved in Bath and Montague's case. Lord Mansfield has also said, that where there is no meritorious consideration, the intention of the person who creates the power cannot properly be fulfilled, unless the form is strictly pursued; and this doctrine has been confirmed by the following modern case. (*a*)

7. A husband, tenant for life, had a power of revocation, by any deed or instrument in writing, to be executed by him in the presence of, and attested by, three or more credible witnesses, and to be enrolled in one of his Majesty's courts of record at Westminster; by and with the consent and approbation in writing of nine persons, or the survivors or survivor of them, but not otherwise. One of the nine persons, whose consent was necessary, gave a power of attorney to the husband, authorizing him to consent to any revocation he should think proper to make, and to execute any deed or instrument necessary for that purpose. By a deed poll, executed by the husband in his own character, and also as attorney to one of the trustees under the power, he revoked the uses: and this deed was enrolled. Seven years after, the husband, by an indenture, reciting the deed of revocation, and that, it being executed by the husband as the attorney of one

(*a*) 2 Vent. 350. Fitzg. R. 220. Cowp. R. 269. Ross *v.* Ewer, 3 Atk. 160. Sprange *v.* Barnard, 2 Bro. C. C. 585.

of the persons whose consent was necessary, upon that account doubts were entertained of its validity as a revocation, revoked the uses, with the consent of all the parties required; but this deed was not enrolled in the lifetime of the husband: the Court resolved that the first deed was not a good revocation, because the consent of one of the persons, whose consent was necessary, was not sufficiently given, by the execution of the deed by the husband, as his attorney: for if such a mode of signifying a consent was held sufficient, it would be a total destruction of the check intended, by requiring the personal approbation of a third person; that the second deed was not sufficient, because 192* it was not enrolled, *and that the enrolment of the first deed could not be transferred to the second; for every thing required to be done, in the execution of such a power, ought to be strictly performed. (*a*)

8. It was held by Lord Eldon, that a power of appointment by deed, to be *signed and sealed in the presence of two or more witnesses*, but not required to be attested by them, the attestation applying only to sealing and delivery, was sufficient; as it should be presumed that the signature was also in the presence of the witnesses. (*b*)

9. In a subsequent case, where a power of sale was given, with the consent of certain persons, testified by a *writing under their hands and seals, attested by two or more witnesses;* the attestation extending only to the sealing and delivery of the deed, Lord Eldon held, that there should have been an attestation of the act of signing; and directed a case to the Court of Common Pleas, where it was agreed that the deed was not executed conformably to the power. (*c*)

10. [In a recent case power was given to M. S., of appointing real estates, by will or codicil, to be by her duly executed *and published* under her hand and seal, in the presence of, and attested by, three or more credible witnesses; M. S. signed, sealed, and delivered, as and for her last will, an instrument which concluded as follows: "In witness whereof I have set my hand and seal hereto, August, A. D. 1801, in the presence of the underwritten. Mary Smith, (L. S.)" The attestation was in these words:

(*a*) Hawkins *v.* Kemp, 3 East, 410.
(*b*) M'Queen *v.* Farquhar, 11 Ves. 467.
(*c*) Wright *v.* Wakeford, 17 Ves. 454.

"Signed, sealed, and delivered, this 5th day of August 1801, as the last will and testament of the said testatrix M. S., who in her presence, and in the presence of each other, have put our names as witnesses, A. B. C." The Court of Exchequer held that the power was well executed, notwithstanding the word published was omitted in the attestation.] (*a*)

11. By the stat. 54 Geo. III, c. 168, it is enacted, "that every deed or other instrument, already made with the intention to exercise any power, authority, or trust, or to signify the consent or direction of any person, whose consent or direction may be necessary to be so signified, shall (if duly signed and executed, and in other respects duly attested) be of the same validity and effect, and no other, at law and in equity, and provable in like manner, as if a memorandum of attestation of signature, or being under hand, had been subscribed by the witness or witnesses *thereto; and the attestation of the witness or wit- *193
nesses thereto, expressing the fact of sealing, or of sealing and delivery, without expressing the fact of signing, or any other form of attestation, shall not exclude the proof, or the presumption of signature."

12. Powers are usually given to trustees and *the survivors and survivor of them and the heirs of such survivor*; and if not given in this manner, a power will not in general survive. Thus, in a modern case, where a power of sale was given to three persons by name, and their heirs, and one of them died; the Court of King's Bench certified, that the power could not be executed by the survivors. (*b*)

13. There are, however, several cases, where a court of equity will support a defective execution of a power; which will be stated in the next chapter.

14. Where the nature of the instrument by which a power is directed to be executed is particularly specified, it must be adopted, [and as a general rule, *the solemnities prescribed by the power must be observed in the execution.*] † Therefore a power to revoke by deed, cannot be executed by will. (*c*)

(*a*) Ward *v.* Swift, 1 Crom. & Mee. 171.
(*b*) Townsend *v.* Wilson, 1 Barn. & Ald. 608.
(*c*) *Infra*, c. 18. (1 Sugd. Pow. 264–268, 6th ed. 4 Kent, Comm. 330–333.)

[† In Hopkins *v.* Myall, 2 Russ. & Myl. 86, a married woman had a power of ap-

15. The Earl of Bath, and Lord Pulteney his eldest son, joined in suffering recoveries, and declared the uses thereof to such persons as Lord Bath and Lord Pulteney, by any deed or deeds, sealed and delivered by them in the presence of two or more credible witnesses, should jointly appoint; and in case of the death of either of them, then as the survivor of them, by any deed or deeds, to be executed as aforesaid, should appoint. Lord Bath, having survived his son, made his will, duly executed and sealed, and thereby devised a piece of ground comprised in one of the recoveries. The question was, whether this will should operate as an execution of the power. A case having been sent by the Court of Chancery to the Court of King's Bench on this point, Lord Mansfield said, the first requisite which the power prescribed was impossible to be performed by will, which
194 * was, that it should be by joint deed of Lord Bath * and his son. It was true the survivor had the same power; but then it was emphatically reserved to be executed by deed. Now the word, "*deed*," in the understanding of the law, had a technical signification, to which a will was in no respect applicable. If any words had been thrown in, such as "*writing*," "*instrument*," or other term of a general comprehensive meaning, it might have been fair to have taken advantage of it, in favor of the intention; but there being no general words, nor any meritorious consideration, it was impossible to say that a will was a deed, within the terms of this power. (*a*)

The Court of King's Bench certified, that the power was not duly executed by this will. This opinion was confirmed by a subsequent determination of that Court, and affirmed by the House of Lords. (*b*)

16. Although the Courts have never deviated from the principle, that all the circumstances required should be pursued, yet in other respects they have acted with sufficient liberality, in

(*a*) Darlington *v.* Pulteney, Cowp. 260.
(*b*) Doe *v.* Cavan, 5 Term R. 567. 6 Bro. Parl. Ca. 175.

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pointing a fund in settlement, by any writing under her hand, attested by two witnesses: the trustees parted with the fund on the joint application of the husband and wife by letter not attested. Sir John Leach, M. R., held that the appointment was invalid, and the trustees were liable to make the fund good. See also Cocker *v.* Quayle, 1 Russ. & Myl. 535; Simeon *v.* Simeon, 4 Sim. 555.]

supporting revocations and appointments. Thus, if a power be given *generally, without any restriction as to the nature of the instrument* by which it is to be executed; or if words of a general nature only, such as "*writing*" or "*instrument*," be inserted, it may in such case be executed *either by a deed or by a will.* (*a*)

17. A person covenanted to stand seised to the use of himself for life, remainder to his eldest son and the heirs of his body; reserving to himself a power by writing, under his hand and seal, and by him delivered in the presence of three credible witnesses, to revoke the uses. Afterwards the covenantor made his will in writing, under his hand and seal, delivered in the presence of four witnesses, and thereby devised the lands comprised in the deed of covenant to his youngest son. It was resolved, that this will, being a writing signed, sealed, and delivered in the presence of three credible witnesses, was a good revocation and appointment. (*b*)

18. In the preceding case, the power was directed to be executed by the donee thereof, being in perfect health and sound memory; and though the verdict did not find his being in perfect health and memory, yet it was held to be well enough; for that should be presumed, unless the contrary was proved.

19. A person devised lands to his wife for life, and then to be * at her disposal, provided it was to any of his children if living, if not to any of his kindred that his wife should please. The wife married a second husband, and conveyed the premises, jointly with him, by lease and release, and fine, to a trustee and his heirs, to the use of the wife for life, remainder to her daughter by her first husband, and the heirs of her body, remainder to her son by her first husband, and his heirs. The Court was of opinion that the conveyance by lease and release was an effectual though an improper execution of the power. (*c*) *195

20. In a settlement, a power was given to Elizabeth Fowke, by a writing under her hand and seal, attested by two or more credible witnesses, (notwithstanding her coverture,) to revoke

(*a*) (1 Sugd. Pow. 260, 6th ed. 4 Kent, Comm. 331.)
(*b*) Kibbet *v.* Lee, Hob. 312. (*c*) Tomlinson *v.* Dighton, 1 P. Wms. 149.

the uses, and by the same or any other deed to appoint new uses. Elizabeth Fowke made her last will in writing, under her hand and seal, and in the presence of three credible witnesses, and thereby, without taking notice of her power, devised the estates. Upon a case sent from the Court of Chancery of Ireland to the Court of Common Pleas there, it was certified that the will was a good execution of the power. And on an appeal to the House of Lords of England, the decree of the Court of Chancery of Ireland, in conformity to the opinion of the Court of Common Pleas, was affirmed, with the concurrence of the Judges. (*a*)

21. Where a power is *given generally* to revoke uses, and appoint new ones; or where a power is given to be executed by *deed* or *will, without prescribing the manner* in which they are to be executed; *the instrument is intended in law to be such a one as is proper for the disposition of that which is to be the subject-matter of the power.* From which it follows that a deed, made in execution of a power, must be sealed and signed, and a will executed according to the Statute of Frauds. (*b*)

22. Lands were conveyed to trustees and their heirs, to the use of them and their heirs, in trust, after raising a sum of money, to convey them to J. S. and his heirs, or to such person or persons as he or they should appoint. J. S., by a will attested by two witnesses only, devised the lands. It was contended that this will should operate as an appointment. But Lord 196* Macclesfield held, that it could not be deemed an *appointment, because it was not executed according to the forms prescribed by the Statute of Frauds. (*c*)

23. But where a power is given, to be executed by a will or writing attested only by two witnesses, in such case, a will, attested by two witnesses only, operates as a good appointment; because it does not derive its effect from the Statute of Wills, but from the deed by which the power is created, and the disposition is not considered as testamentary in its origin. (*d*)

[But, of course, a man cannot reserve such a power to himself

(*a*) Roscommon *v.* Fowke, 6 Bro. Parl. Ca. 158. (Porter *v.* Turner, 8 S. & R. 108. 1 Sugd. Pow. 277, 6th ed.) Burnet *v.* Mann, 1 Vez. 157.

(*b*) (1 Sugd. Pow. 297, 6th ed.) 1 P. Wms. 741.

(*c*) Wagstaff *v.* Wagstaff, 2 P. Wms. 258. Duff *v.* Dalzell, 1 Bro. C. C. 147.

(*d*) Dey *v.* Thwaites, 3 Cha. Ca. 69. Fearne's Op. 432. Guy *v.* Dormer, *infra*, s. 32.

by his own will, for that would be an evasion of the Statute of Frauds.] (*a*)

24. Where *no interest passes from the person who executes a power directed to be done by will*, and he is merely to apportion that which another person has given, in such a case, as he is not the person who makes the charge, or affects the estate, it is not necessary that such a will should be executed according to the Statute of Frauds. (*b*)

25. Thomas Clough, being tenant for life under a marriage settlement, with remainder to his first and other sons in tail, and having two sons, John and Thomas, who were of age, they entered into articles reciting the settlement, and that there was no provision for younger children, and agreed that £300 should be raised for that purpose, immediately after the death of the father; and should be paid to the younger children in such a manner and form as the father should by his last will, duly executed, direct and appoint. The father, by a will attested by two witnesses only, distributed this sum of £300. It was decreed, by Sir John Strange, M. R., that this will, though not duly executed according to the Statute of Frauds, was still a good appointment; because it did not make the charge, but only distributed the money. (*c*)

26. *Although a will, made in execution of a power*, does not derive its effect from the Statute of Wills, but from the deed of uses by which the power is created; and a will made under these circumstances, is in fact an appointment of a use, not a devise, yet it *retains all the essential properties of a will.* Thus, a will made in execution of a power is revocable; whereas it has been stated, that if a person executes a power by deed, he cannot after revoke such deed, unless he has reserved to himself a new power of revocation. (*d*)

27. So *the appointee under a will*, made in execution of a *power, *must survive the appointor*, otherwise the *197 appointment will be void. And an appointment by will, under a power, operates as a common devise; for the appointee

(*a*) Habergham *v.* Vincent, 2 Ves. 204. (*b*) (1 Sugd. Pow. 261, 262, ed 6th.)
(*c*) Jones *v.* Clough, 2 Ves. 365. (1 Sugd. Pow. 296–298, 6th ed.).
(*d*) Lawrence *v.* Wallis, 2 Bro. C. C. 319. *Ante*, c. 13, § 23.

in fee-simple, if heir at law, is in by descent, not by purchase. (*a*) †

28. *A will made in execution of a power* is *construed in the same manner as a proper will;* for otherwise there would be a strange confusion in the interpretation of testamentary dispositions, if some were to be construed as proper wills, and others as appointments. (*b*)

29. An instrument *may operate as a revocation and appointment, without any recital or mention of the power.* For if the act done be of such a nature that it can have no operation, unless by virtue of the power, the law will resort to the power, and thereby give validity to the instrument, upon the principle, that *quando non valet quod ago, ut ago, valeat quantum valere potest.* (*c*)

30. Clement Harewood, being seised of three acres of land held *in capite*, made a feoffment in fee of two of them, to the use of his wife for life; and afterwards made a feoffment of the third acre, to the use of such person or persons as he should by his last will in writing appoint. Clement Harewood afterwards devised the third acre, by his will in writing, to a stranger in fee. It was resolved, that as Clement Harewood had not a power of devising the third acre under the Statute of Wills, it being held *in capite*, his will should operate as an appointment under his power; for otherwise it would have no effect. (*d*)

31. N. Scrope reserved to himself a power of revocation by writing indented under his hand and seal, subscribed in the presence of three witnesses; afterwards, by indenture, subscribed in the presence of three witnesses, he covenanted to stand seised of the same lands to other uses. It was resolved in the Court of Wards, by the two Chief Justices and the Chief Baron, that

(*a*) Tit. 38, c. 8. 1 Ves. 135. 2 Ves. 612. (*b*) 2 Ves. 212.

(*c*) Hob. 160. (Bradish *v.* Gibbs, 3 Johns. Ch. 551. Andrews *v.* Emmot, 2 Bro. Ch. Cas. 303, note (*b*), by Perkins. 4 Kent, Comm. 334. 1 Sugd. Pow. 378, 6th ed. *Infra*, ch. 20, § 33.) (*d*) Clere's case, 6 Rep. 17. Cro. Eliz. 877. Cro. Jac. 31.

[† That is, where the appointment is by the will of a person dying before the 31st December, 1833; but the law is now altered as to devises by wills of persons dying after the above day, by stat. 3 & 4 Will. 4, c. 106, s. 3, and the devisee (being heir) takes by purchase.]

although there was no express declaration of any intention to revoke the former uses, yet that this conveyance should enure, first as a revocation of the former uses, and secondly, as a declaration of new uses; *quia non refert an quis intentionem suam* * *declaret verbis, an rebus ipsis et factis.* And when * 198 Scrope limited new uses, he thereby signified his purpose to revoke the former ones. (*a*)

32. W. Dormer conveyed his estate to trustees to certain uses, with a proviso that if he should, by any writing, executed in the presence of two or more witnesses, in express words, signify and declare his intention to revoke or make void that deed, the uses should cease. W. Dormer afterwards made his will in writing, signed and sealed in the presence of two witnesses, by which he gave and devised the lands to different persons, from those to whom they were limited by the deed. It was contended that the phrase, "*in express words*," excluded all implied revocations; but it was determined that the will operated as an execution of the power. (*b*)

33. *The instrument* by which a power is executed, *must however mention* or *have some reference to the estate* on which it is intended to operate, otherwise it will not be considered as a revocation or appointment. But it will be sufficient if the estate, subjected to the power, be referred to, in terms which include it with other property of the appointor, although it be not particularized. (*c*)

34. A person having a power to charge an estate with £2000 after the death of his wife, and a term for years being created for that purpose, he made a will beginning with these words, "I charge all my real estate." It was held by Lord Hardwicke, that if a man had power to charge an estate, it was not necessary in the execution of it that he should refer to the deed out of which the power arose; for in a court of equity it was enough that his intent appeared: and if in the execution he sufficiently described the estate which he had power to charge, it would be bound; especially where the person charging was a purchaser of the power: and he held the power to be well executed. (*d*)

(*a*) Scrope's case, 10 Rep. 143.

(*b*) Guy *v.* Dormer, T. Raym. 295. Gilmore *v.* Harris, Skin. 325. Deg. *v.* Deg. 2 P. Wms. 414. 2 Bro. C. C. 303.

(*c*) (1 Sugd. Pow. 335, 6th ed.)

(*d*) Probert *v.* Morgan, 1 Atk. 441. Ex parte Caswall, 1 Atk. 559.

35. A person devised his real estate to be sold, and gave the money arising from the sale, and the residue of his personal estate, in trust for his wife for life, and after her decease, as to one moiety, for such person or persons as she should by any deed or writing, or by will, with two or more witnesses, appoint. The real estate was not sold. The testator's widow received the rents and profits, and the produce of the personal estate for her life; and by her will, after disposing of some specific 199 * articles, which *she described to have been her husband's, she gave the residue thus:—"All the rest, residue, and remainder of my estate and effects, of whatever nature or kind soever, and whether real or personal, and all my plate, china, linen, and other utensils which I shall be possessed of, interested in, or entitled to, at the time of my decease, subject to and after payment of all my just debts, funeral expenses, and charges of proving my will, and specific legacies, I give to A. B., &c. This will was attested by three witnesses. The testatrix had no other real estate than that directed by her husband's will to be sold. One of the questions was, whether the residuary clause in this will was a good execution of the power of appointment.

Lord Loughborough.—"It is material to consider what the interest was that she took under her husband's will, and what she has done. She was entitled for life to the income of all the residue of his real and personal estate, and a moiety was given to her absolute disposal, by any deed or writing, or by her will, attested by two witnesses. She was not limited as to objects; and as to the mode, it was as ample a latitude as any one could have. It is a little hard to attempt to explain that it was not her estate: how could she have had it more than by the enjoyment during life, and the power of disposing to whatever person and in whatever manner she pleased, with the small addition of two witnesses? By her will she gives all her estate and effects. It is hard to say, that using that expression, she meant to distinguish, and not to include this, which was as absolutely hers, as any other part of her property. But the person who drew the will goes on with argumentative phrases, "of what nature or kind soever, and whether real or personal:" these words do not add much to the force of it, "which I shall be possessed of, inter-

ested in, or entitled to." It is admitted there would be no doubt if she had said, *of which I have power to dispose.* Those last words would not add much, after what she had said before. But take it according to the strict technical rule in Sir Edward Clere's case, that a general disposition will not dispose of what the party has only a power to dispose of, unless it is necessary to satisfy the words of the disposition. The testatrix had no other real estate. I am bound to satisfy all these words: upon the technical rule, I can satisfy them no other way; I cannot avoid supposing what every one must be convinced she meant, *that she made no difference between what she had from her husband, and her other property. (a) *200

On an appeal to the House of Lords, this decree was affirmed. (b)

36. It should however be observed, that the cases where a power has been held to be executed, under the *general words* of a will, are only these: either *where the words of the will cannot be satisfied without its operating as an appointment;* or, *where there is some description of, or allusion to, the property which is the subject of the power.* For if the doctrine be carried any further, a person having a power could never make a will, without being held to have executed the power. (c)

37. Although a power of appointment be directed to be executed by any deed or writing, yet it *may be executed by several acts and assurances*, provided they have such a relation to each other that they may be considered as *making together but one assurance.* (d)

38. A person having a power to revoke by indenture, executed a deed, whereby he covenanted to levy a fine to other uses; and afterwards levied a fine accordingly. Lord Hale said—"Upon the close and nice putting of the case, this might seem to be no revocation, for it was clear that neither the deed nor the fine separately taken could revoke; but *quæ non valent singula, juncta prosunt.*" And it was determined that the deed and fine taken together operated as a good revocation. (e)

(a) Standen v. Standen, 2 Ves. 589. Hougham v. Sandys, 2 Sim. 95. Maples v. Brown, Ib. 327. (b) 6 Bro. Parl. Ca. 193.

(c) Andrews v. Emmot, 2 Bro. C. C. 297. Langham v. Nenny, 3 Ves. 467. Lewis v. Lewellyn, 1 Tur. & Rus. 704.

(d) (1 Sugd. Pow. 290, 6th ed. Porter v. Turner, 3 S. & R. 108.)

(e) Leicester's case, 1 Vent. 278.

39. Sir James Williams made a voluntary settlement to the use of himself for life, remainder to his brother in tail, reserving to himself a power of revocation, by deed indented under his hand and seal. Some time after, Sir J. Williams levied a fine, and by a deed made between him, his brother, and others, bearing date a month after the fine was levied, reciting the fine, it was declared, that at the time of levying the said fine, the agreement of all the parties was, that it should enure to the use of the said Sir J. Williams and his heirs. It was determined in the Exchequer Chamber, by six Judges against two, that this fine and declaration of uses were to be considered as one and the same conveyance; and operated as an execution of the power. (*a*)

40. Powers of revocation and appointment may also be *executed at different times*, over *different parts of the estates* that are subject to the power. (*b*)

201 * *41. C. Digges, in consideration of his marriage, covenanted to stand seised to the use of himself for life, remainder to the use of his son in tail, with a proviso, that it should be lawful for him to revoke any of the uses or estates, and to limit new uses. Digges revoked the uses of part of the lands, and afterwards revoked the uses of another part. It was resolved that he might revoke part at one time, and part at another, and so of the residue, till he had revoked all. (*c*)

42. A power was given by will to a person, "from time to time, by deed or deeds, writing or writings, to limit or appoint to the use of any woman or women, for and in lieu of a jointure, all or any part of the land," &c. The devisee, on his marriage, appointed part of the premises to the use of his wife, pursuant to his power. Afterwards the devisee, by another deed, reciting that he had got an additional portion by his wife, in consideration thereof, and as an additional jointure, appointed another part of the premises to the use of his wife. The question was, whether the devisee had not completely exhausted his power by the first appointment, or whether he had still sufficient power to make the second appointment. It was unanimously resolved, that the power was not exhausted by the first appointment, and therefore that the second appointment was good. (*d*)

(*a*) Herring *v.* Browne, 1 Vent. 368. 2 Show. 199. Carth. 22.
(*b*) 1 (Sugd. Pow. 357, 6th ed.)
(*c*) Digges's case, 1 Rep. 173. Sir R. Lee's case, 1 And. 67, S. P.
(*d*) Zouch *v.* Woolston, 2 Burr. 1136. 1 Black. R. 281.

43. It is laid down by Lord Nottingham, that where a man has a power of appointing a fee, he may execute it at several times, and appoint an estate for life at one time, and the fee at another. And in a modern case Lord Kenyon said,—"A power may be executed at different times, if not fully executed at first; provided the party, in the whole execution, do not transgress the limits of the power, as in Zouch *v.* Woolston. (*a*)

44. An appointment may *in some instances have a partial effect*, and only operate as a *revocation pro tanto.* Upon this principle it has been held, that where a person, having a power of revocation and appointment, mortgages the lands, such a mortgage only operates as a revocation *pro tanto;* because in equity the mortgagor still continues owner of the estate; a mortgage being considered as a pledge only for the money borrowed. (*b*)

45. But where a mortgage is made by an execution of a power, and there is also a complete disposition of the equity of redemption, there the revocation will be complete.

*46. A person, who had a power of revocation and appointment, conveyed the estate to trustees and their heirs, upon trust out of the rents and profits, or by mortgage or sale, to raise so much money as should be sufficient to pay all the debts mentioned in a schedule thereunto annexed; and after payment thereof, to pay the overplus, and re-convey such part as should be unsold, to the grantor, or such other person as he should appoint. It was determined that this deed operated as a complete revocation of the uses, and not as a revocation *pro tanto;* and this decree was affirmed in the House of Lords. (*c*) *202

47. *Where a power is exceeded* by an appointment, either by a disposition of a larger interest than is warranted by the power, or to persons not objects of the power, *the excess only is void*, and the *courts of equity* will support the execution, as far as the power will warrant.[1]

(*a*) 1 Vern. 85. 2 Term R. 725. (*b*) Perkins *v.* Walker, 1 Vern. 97.
(*c*) Fitzgerald *v.* Fauconberge, Fitzg. 207. 6 Bro. Parl. Ca. 295.

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[1] The rule was thus stated by Sir Tho. Clarke, M. R., in Alexander *v.* Alexander, 2 Ves. 644.—"Where there is a complete execution of a power, and something *ex abundanti* added which is improper, there the execution shall be good, and only the excess void; but where not a complete execution of a power, or where the boundaries between the excess and execution are not distinguishable, it will be bad." And see

48. A tenant for life of an estate on which were mines, with power to let leases in possession for twenty-one years, made a lease of the mines for twenty-six years; without reference to the power. This was held a good lease in equity for twenty-one years. (*a*)

49. [In the former edition of this work, the author adds to the last paragraph "and I conceive would be *good at law;*" but that opinion *cannot now be supported.* In a late case it has been decided that, under a power to lease for any term, &c., not exceeding twenty-one years, or for lives, &c., a lease for ninety-nine years, determinable on lives, was bad to that extent, and could not be considered good *pro tanto*, that is, for twenty-one years, determinable on the lives. (*b*)

50. The case of Adams *v.* Adams, next cited by the author, is distinguishable from the case of Campbell *v.* Leach, because, as Sir Edward Sugden observes in the former case, there was a distinct independent limitation introduced, not authorized by the power, whereas in Campbell *v.* Leach, the excess is interwoven with the limitation authorized by the power.] (*c*)

51. Lands were limited to Shute Adams for life; remainder to Frances Adams, his wife, for life; remainder to the use of such child or children of the said Shute Adams, and Frances his wife, and for such estate and estates, as they should jointly, or as the survivor, in case of no joint appointment, should by deed or will direct or appoint; and for want of such direction or appointment, to the use of the first and every other son of the said Shute Adams, and Frances, his wife, severally and successively
203* *in tail. Frances Adams survived her husband, and by deed reciting her power, appointed the premises to the use of Mary Shute Adams, her eldest surviving daughter, for life; remainder to trustees to preserve contingent remainders; remainder to her first and other sons in tail male; remainder to her daughters in tail general; remainder to Catherine Adams, the

(*a*) Campbell *v.* Leach, Amb. 740.
(*b*) Roe *v.* Prideaux, 10 East, 158.
(*c*) (2 Sugd. Pow. 81, 6th ed.)

Attorney-Gen. *v.* Griffith, 13 Ves. 565, 576; 2 Sugd. Pow. 80, 81, 6th ed.; Warner *v.* Howell, 3 Wash. 12. The consequences of an excessive execution of powers, whether it be in the objects, the quantity of estate, or the conditions annexed to the estate, are particularly considered in 2 Sugd. on Powers, ch. 9, p. 59–93, 6th ed.

other daughter of Frances, for life; remainder to her sons and daughters in the same manner; remainder to the use of the right heirs of the said Frances forever. Frances Adams died, leaving the said two daughters and one son. The case being referred by the Court of Chancery to the Court of King's Bench, that Court certified their opinion that though Frances Adams exceeded her power, which was confined to child or children, by limiting estates to her grandchildren, yet the same ought to prevail so far as her power extended, and that the limitation to her daughters was good; but that the disposition of the inheritance to the child or children of her daughters was void; therefore there was no appointment of the inheritance, and the son took an estate tail therein, subject to the estates for life of his sisters. (*a*)

52. A power of appointment was given to husband and wife, and the survivor of them, unto and among all the children of the marriage, for such estates as they should appoint; and in default of appointment, to the first and other sons of the marriage in tail male, remainder to the right heirs of the husband. The wife having survived, appointed the estate to a daughter for life, remainder to her eldest son for life, remainder to his first and other sons in tail male, remainder to her second son in the same manner, remainder to her daughter in fee. Both the sons died without issue. Lord Kenyon said, the wife had no power to appoint to the children of unborn children, but was confined to execute her power among the children. So far, therefore, as she appointed an estate for life to the daughter, with remainder for life to the eldest son, she did well; beyond that she exceeded her power, in appointing to the issue of the son; and therefore the excess was void. But it was equally clear that she did not intend that the subsequent limitation over to the daughter in fee should be accelerated; but it was made to depend upon the intermediate limitations to the issue of her brothers, and she was not to take till their issue male were extinct. Those intermediate limitations therefore being void, *the ultimate *204 remainder dependent upon them must also fall. If, then, the appointment were originally bad for the excess, the subsequent circumstance of the death of the brothers without having

(*a*) Adams *v.* Adams, Cowp. 651. Robinson *v.* Hardcastle, 2 Term R. 241.

had issue, could not make it good; the appointment must have been legal at the time of its creation. Therefore the estate must go as in default of appointment. (*a*)

53. [In a recent case, a fund was by marriage settlement vested in trustees, in trust for all and every the child and children of the marriage, in such shares, at such age or ages, time or times, and subject to such conditions, restrictions, and limitations, as the wife, in case she survived her husband, should appoint. There was only one child of the marriage; the wife surviving, appointed the fund to that child for her separate use for life, and after her decease, *to such person as she* (*the child*) *should appoint*, and in default of such appointment, to the executors or administrators of the child. Sir L. Shadwell, V. C., decided the power was well executed. (*b*) †

54. A condition annexed to an appointment, where the power does not warrant such condition, will be deemed void. So that if a father, having a power to appoint a sum of money among his children, qualifies his appointment to one of them with a condition, that he shall release a debt, or pay a sum of money; the appointment will be absolute, and the condition void. (*c*)

(*a*) Brudenell *v.* Elwes, 1 East, 442. 7 Ves. 382.
(*b*) Bray *v.* Hammersley, 3 Sim. 513. See also 2 Wils. 336.
(*c*) 2 Vez. 644. Pawlet *v.* Pawlet, 1 Wils. R. 224.

[† The above decision is of importance in practice, and the precise point does not seem to have been previously determined. The reader will observe that the case is clearly distinguishable from that class, where an excessive appointment has been sustained in equity, on the ground that the object of the power was a consenting party, the appointment being virtually a settlement by the object of the power. Routledge *v.* Dorril, 2 Ves. 357; White *v.* St. Barbe, 1 Ves. & B. 399; Tucker *v.* Sanger, M'Clel. 425, 439. The difficulty in Bray *v.* Hammersley is not that the power was delegated, which appears from the report to have been an argument against the validity of the appointment by the mother, but that, in the exercise of a power of appointment to a particular class of objects, a general power of appointment is given to one of the objects, and by means of which latter power, an appointment might be made to strangers, not objects of the original power. The argument in favor of the appointment is, that it merely confers upon the object of the power a peculiar and exclusive mode of enjoyment, tantamount to absolute ownership; that the subject of the power was a trust fund and the power equitable. If the subject of the power had been real estate, and the power, to appoint the legal use among the children, it is submitted, that, under an appointment in exercise of the power reserved to the child, a legal use would not have arisen; although the appointment by the mother might be supported in equity, in conformity with the above decision of Bray *v.* Hammersley.]

55. The principle upon which this doctrine is founded is, that where there is a complete execution of a power, and *something *ex abundanti* is added, not warranted by the *205 power; there, *if the excess be distinguishable*, so that the Court can draw a line, the execution will be good, and the *excess only void.* But if the boundary between the execution and the excess *cannot be ascertained*, the execution will then be *void for the whole.*

56. An appointment in execution of a power will be good, though it *limits a less estate* than that which the appointor was capable of creating.

57. J. S. having four children, two sons and two daughters, settled his estate to the use of himself for life, remainder to his wife for life, and after their decease, to the use of such child and children, and in such shares and proportions, as he should appoint. J. S., by his will, devised a rent charge out of those lands to his youngest son for life, remainder to the first and other sons of his body, and if he died without issue, so as the estate should come to his eldest son, then to pay £500 apiece to his daughters. The eldest son insisted that the power was not well pursued, as the testator might have distributed the lands among his children, but had no power to devise a rent charge, or sums of money. But the Court held the appointment good. (*a*)

58. Husband and wife levied a fine of the wife's estate; and the uses declared were, that the husband and wife, or the survivor, should have a power to appoint and divide the estate among their younger children, in such proportions as they or the survivor should think proper. The husband survived, and by his will gave his daughter, who was the only younger child, £3000, charged upon his wife's estate, intending thereby to execute his power. One of the questions was, whether this was a good execution of his power. It was urged that this was a naked power, and ought to be executed in the very terms of it; and it was compared to a condition, which must be strictly performed. But it was resolved by Lord Hardwicke, that the power was in substance well executed. It was true the direct terms of the power were not pursued, but the intent and design of it were. It was

(*a*) Thwaites *v.* Dye, 2 Vern. 80.

admitted that the husband might have appointed part of the estate to be sold, and given the money, raised by such sale; and what was done was exactly the same thing. The Court might order a sale. It was the same, to the heir or remainder-man, which way the child was to be provided for, only that 206 * giving a portion of the estate itself * might be a means to tear it in pieces; whereas the estate would be kept entire; and it was better for the daughter, and perhaps thought so by the testator, that she should have a sum of money, than a small estate; and though the will might not enure as a good execution of the power, in strictness; yet within the meaning and design of it, it was a good charge for the young lady's benefit; and the case of Thwaites *v.* Dye was a very strong one to that purpose. (*a*)

59. A tenant for life, having a power to limit the lands to any woman whom he should marry, for her life, by way of jointure, made a lease for ninety-nine years, determinable on the death of his wife, by way of a jointure for her. It was held by the Court of King's Bench, on a special verdict, that this was not a good execution of the power at law; for the estates were totally different, one being a freehold, and the other a chattel. But Lord Mansfield observed, in a subsequent case, that the widow brought her bill in Chancery, and that Lord Talbot, arguing from the same premises, the power and the lease, without any other circumstance, held the lease to be warranted by the power; he said it was not a defective but a blundering execution; and he decreed the defendant to pay all the costs both at law and in equity. (*b*)

60. A *power of charging an estate with portions for younger children*, or of *appointing an estate among them*, has been held to be *well executed by a will, directing a sale*, and *appointing the money*.

61. In a marriage settlement, there was a covenant by the intended husband, to purchase and convey an estate in strict settlement, with a power to the husband, tenant for life, in case there should be any younger child or children, to charge such sum or sums of money for such younger children, as he should appoint. The husband declared by his will that a particular farm should be sold after his wife's death, and the money dis-

(*a*) Roberts *v.* Dixall, 2 Ab. Eq. 668. Sugd. Pow. App. No. 22. *Ante*, s. 57.

(*b*) Rattle *v.* Popham, 2 Stra. 992. See Sug. Pow. 468, *et seq.* 5th ed. See 10 East, 184. 2 Burr. 1147.

posed of among his younger children. The Court said, that this appointment, being in substance exactly what the husband had a right to do, was good. (*a*)

62. In a settlement, there was a power given to the husband, of appointing the lands to the children. The husband by his will, reciting the settlement, and the power therein contained, devised the estates so settled to trustees, to sell and dispose thereof and to divide the produce among his children. The Master * of the Rolls (Sir W. Grant) held this a good *207 execution of the power. (*b*) †

63. [In Ward *v.* Hartpole, a general power, with consent of trustees, to the tenant for life, to raise any sum of money he should think fit, was held to be well executed, by a lease for lives granted for a fine, at an annual rent, notwithstanding the settlement also contained a power of leasing for lives at the best rent without fine.] (*c*)

64. Where a person has a power of appointing an estate, or a sum of money, *unto and among his children*, or any other class of persons, in such shares and proportions as he shall think proper; the [courts of equity have decided that the] appointor must give the whole among the children, or class; and each of them must have *such a fair and reasonable share as is not illusory;* [notwithstanding the appointment of a nominal share is valid at law. ‡ [1]]

65. The trust of a term of 300 years, was declared to be for raising such sums of money, for the portions of the children of a marriage (except an eldest or only son,) in such manner, and at such time, and under such limitations, as the husband should by deed or will appoint; so as such sum or sums did not, in the

(*a*) Long *v.* Long, 5 Ves. 445. (*b*) Kenworthy *v.* Bate, 6 Ves. 793.
(*c*) 8 Bligh, 470.

[† From the above authorities, and that of Bullock *v.* Fladgate, 1 Ves. & B. 478, the principle may be extracted, that where a person has a power to appoint an estate in settlement to his children, and the estate, under a power of sale, becomes converted into money, the donee of the power may appoint the fund, in its state of conversion, to the objects of the power.]

[‡ See the preamble of the stat. 1 Will 4, c. 46. This statute now authorizes the appointment of a nominal share.]

[1] The subject of illusory executions of powers is fully treated in 1 Sugd. on Powers, ch. 7, sec. 6, p. 568–581, 6th ed.

whole, exceed £2000. There were three younger children; and the husband by his will, reciting that his two daughters were amply provided for by their grandmother, appointed the whole of the money to his second son. It was decreed, that the execution of the power was void. (*a*)

66. [In powers of appointment, the words "to the use of all and every the child and children," † "unto and among," ‡ "unto and among such children begotten between us, and in such proportions" § "to her children in such manner, &c.," ‖ or, "amongst a certain number of objects," ¶ have been construed 208* *not to authorize an exclusive appointment; and all the objects were held entitled to a *substantial* share.] ††

67. If, however, it appears from the words of the power, to have been the *intention of the parties* that the appointor should be enabled to *appoint the whole* of the property *to any one* of the persons intended to be benefited, an exclusive appointment to one will be good.

68. The trust of a term was declared, that if Robert Austin should die, leaving issue by his wife a son and other children, then to raise a sum not exceeding £1500 for the sole benefit and

(*a*) Menzey *v.* Walker, Forr. 72.

[† Pocklington *v.* Bayne, 1 Bro. C. C. 450.]

[‡ Malim *v.* Keighley, 2 Ves. 533.]

[§ Alexander *v.* Alexander, 2 Ves. 640.]

[‖ Walsh *v.* Wallinger, 2 Rus. & M. 78.]

[¶ Kemp *v.* Kemp, 5 Ves. 849. Garthwaite *v.* Robinson, 2 Sim. 43.]

[†† In similar cases, the above act, 1 Will. 4, c. 46, now authorizes the appointment of a nominal share. But as the act has no retrospective operation, all appointments made before the 30th of July, 1830, will of course be governed by the law as it stood before the passing of the act.

The words of the act are, "That no appointment, which from and after the passing of this act, shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only, shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law; notwithstanding that any one or more of the objects, shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power."

The act then provides that nothing therein shall prejudice any provision in a deed or will creating the power, which shall declare the amount of the share from which no object shall be excluded.]

advantage *of such child or children*, (other than an eldest,) *in such proportions, manner, and form*, in all respects, as the said R. A. should for such purpose, by his last will in writing, direct, limit, or appoint; and in default of such direction, then to the sole benefit of such child, if but one; and if more, (other than an eldest,) to them all equally. R. A., by his will, directed the money to be raised, and appointed £450 to one of the younger sons, and £1050 to a daughter; but gave nothing to another * younger son; who brought his bill to be let in to *209 a share of the £1500. It appearing, however, that he was otherwise provided for, and because there was a discretionary power in the father, which he had exercised in a reasonable manner; the bill, after long consideration, was dismissed. (*a*)

69. Lands were limited in a marriage settlement, to the use of John Gregson for life, remainder *to and for the use and behoof of such child and children of the said J. G.*, and for such estate and estates, intents and purposes, as the said J. G. should appoint; and for want of such appointment, to the use of all and every the child and children of the said J. G. equally. J. G. by deed, reciting the settlement, and that he had two children, a son and a daughter, appointed that the premises should, after his decease, go to the use of the son, and the heirs of his body, remainder to the daughter and her heirs. The daughter brought an ejectment for the recovery of an undivided moiety of the estate, upon the ground that the appointment was illusory and void. (*b*)

70. Mr. Justice Buller said, the words of the power were "to and for the use and behoof of such child and children, and for such estate and estates," &c. The argument for the plaintiff was, first, that where there is a power to give an estate to and amongst all and every the children, each must have a beneficial part; and secondly, that these words were tantamount to those. His objection was to the minor proposition. These words were not like those assumed: there were no such words in this power as, *to and amongst*, but just the reverse, for it was a power to appoint to the use and behoof of such child *and* children; therefore, instead of including all, it says, that the appointor may appoint to one only. The plaintiff's counsel had admitted that under a

(*a*) Austin *v.* Austin, 2 Ab. Eq. 667. Leife *v.* Saltingstone, 1 Mod. 189, and see 5 Ves. 857.
(*b*) Swift *v*, Gregson, 1 Term R. 432.

power of appointing to *such of the children*, &c. an appointment to one only would be good; but the present words were stronger; an appointment to one, under a power of appointing to such child or children was good, because it includes one. He cited the case of Spring *v.* Biles, Mich. 24 Geo. III., B. R., where a power was given to dispose of lands "to and amongst such of my relations as shall be living at the time of my decease; in such parts, shares, and proportions as my wife shall think proper."

And it was determined that an appointment of the whole
210 * estate to one of the relations was good. He observed * that that case, with the difference only of *relations*, instead of children, was stronger than the present. There the power was, "To and amongst such of my relations, &c. in such parts, shares, and proportions, &c.; which imported that a division was intended: but in the present case, the words, "parts, shares, and proportions," were not used, and there was no evidence of an intention that it should be divided into shares. In that case, the Court said, they had not a particle of doubt but that the word *such* meant one or more. Here, therefore, it must have the same construction. It must mean that the appointor should appoint to one or more. Judgment was given for the defendant. (*a*)

71. [In addition to the cases cited above, the words, "to one or more of my children as my wife shall think fit;" † "to be at my wife's disposal, provided it be to any of my children;" ‡ "amongst all or such of my children;" § "to and amongst such of my relations, in such parts, shares, and proportions;" ‖ "for the use of such of the children or child, in such shares, &c. and in such manner as A and B or the survivor, should appoint;" ¶ "unto and amongst all such child or children of A in such parts, &c." †† have been held to authorize an exclusive appointment.]

72. It has been determined, in some modern cases, respecting personal property, that an illusory appointment may be accounted for by circumstances. And, therefore, where a person, having a power of appointment among his children, and having advanced one of his daughters in marriage, recited that as a reason] for

(*a*) Doe *v.* Alchin, 2 Barn. & Ald. 122. Kenworthy *v.* Bate, 6 Ves. 793.

[† Thomas *v.* Thomas, 2 Vern. 513.]
[‡ Tomlinson *v.* Dighton, 1 P. Will. 149.]
[§ Macey *v.* Shurmer, 1 Atk. 389.]
[‖ Spring *v.* Biles, 1 T. R. 435, n.]
[¶ Doe *v.* Alchin, 2 Barn. & Ald. 122.]
[†† Wollen *v.* Tanner, 5 Ves. 218.]

giving her a small share; the appointment was held not to be illusory. (*a*)

In a subsequent case, it was said, that in equity, an appointment of a very small share was not illusory, if justified by circumstances; as where the object was otherwise provided for. And Lord Eldon has observed, that the question whether an appointment is or is not illusory, must be determined upon the circumstances of each case, according to a sound discretion; the power, however large the terms, being in some degree coupled with a trust; but an equal distribution is not required, nor any reason for the inequality, unless a share is clearly unsubstantial. (*b*)

*73. In Wilson *v.* Piggott, (*c*) the proportion of one sixtieth part of the whole fund to one fourth, which would have been an equal division, was held not to be an illusory share. In Alexander *v.* Alexander, (*d*) one sixtieth to one fifth. In Kemp *v.* Kemp, (*e*) one one-hundred-and-ninetieth to one third. In Butcher *v.* Butcher, (*f*) one one-hundred-and-twenty-second to one ninth. In Bax *v.* Whitbread, (*g*) one twenty-fifth to one half. In Mocatta *v.* Lousada, (*h*) one seventy-fifth to one fifth; and in Dyke *v.* Sylvester, (*i*) one one-hundredth to one ninth—were held not to be illusory.] *211

74. A power of revocation and appointment *cannot be delegated to another;* whether the power relate to the land, or is only collateral to it; for it is a maxim of law, that *delegatus non potest delegare.* (*j*)[1]

(*a*) Boyle *v.* Bishop of Peterboro', 1 Ves. 299. Bristow *v.* Warde, 2 Ves. 336.

(*b*) 4 Ves. 785. 5 Ves. 859. Bax *v.* Whitbread, 16 Ves. 15. Butcher *v.* Butcher, 1 Ves. & Beam. 79.

(*c*) 2 Ves. 351. (*d*) 2 Ves. 640. (*e*) 5 Ves. 649.
(*f*) 9 Ves. 382. (*g*) 10 Ves. 31. (*h*) 12 Ves. 123.
(*i*) 12 Ves. 126.

(*j*) (Berger *v.* Duff, 4 Johns. Ch. 368. 1 Sugd. Pow. ch. 5, p. 221-225, 6th ed.)

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[1] Where a power is given to several persons, to do a *private* act, they must *all* join in executing the power, unless the contrary is expressed. But where the business is of a public nature, it may be well executed by a majority of those appointed; as, for example, to view a road and estimate damages; Baltimore Turnpike case, 5 Binn. 484; or, to build a prison; Commissioners, &c. *v.* Lecky, 6 S. & R. 170; or, to manage the trust of public lands. McCready *v.* Guardians, &c. 9 S. & R. 94. And see *supra*, ch. 13, § 48, note. See also, Sinclair *v.* Jackson, 8 Cowen, 543. The State *v.* Delieseline, 1 McCord, 60.

75. A husband, by his marriage articles and settlement, had a power of disposing by deed or will of a reversionary interest, to the issue of the marriage, in such proportions as he should think fit; the husband, by his will, reciting the power, delegated it to his wife, that she might dispose of the estate among the children in such proportions as she should think proper. Lord Hardwicke said, this must be considered as a power of attorney, which could only be executed by the husband, to whom it was confined; and was not in its nature transmissible to a third person. (*a*)

76. This doctrine is however confined to that part of the execution of a power, in which the *confidence* and *discretion* is exercised; and does not extend to mere *formal acts.* In the case of the Attorney-General *v.* Scott, 1 Ves. 413, where a power was vested in trustees to elect a minister, Lord Hardwicke declared, that if the trustees had met, and agreed upon the person, they might make proxies to sign the presentation; for where a trustee had a legal estate vested in him, he might make an attorney to do legal acts. And it has been held, in practice, that where an estate is vested in trustees, upon trust to sell, with the usual proviso that their receipts shall be a sufficient discharge to the purchasers; if the trustees themselves sell the estate, they may afterwards delegate the performing all such formal acts as may be necessary for completing the sale, and among others, that of signing the receipts, in their names, to others. (*b*)

77. But if a power be *expressly given*, to be executed by the donee, *or his assigns;* an *execution of it by an assignee* will in such case be good. And a devisee will be considered as an assignee within the words of the power. (*c*)[1]

212* *78. A fine was levied of certain lands, to the use of T. for life; remainder to I., his son, and his heirs male of his body; remainder to I., his executors and assigns, for eighty years, and that he, and his *assigns* of the said term, should have full power and authority to demise, &c., for twenty-one years, or three

(*a*) Ingraham *v.* Ingraham, 2 Atk. 88.
(*b*) Cole *v.* Wade, 16 Ves. 27. (1 Sugd. Pow. 223, 6th ed.)
(*c*) Englefield's case, *infra*, c. 19.

[1] The general principle of the devolution of a trust by devise, has already been considered. See *ante*, tit. 12, ch. 2, § 9, note.

lives, rendering the ancient rent. I., the son, devised this term, and died without issue male; the devisee entered, made his executors, and died. The executors assigned over the term, with power to make leases; and the question was, whether the power annexed to the term for eighty years was transferable, with the term, to assignees in law. The Court was of opinion, that the power was well transferred, and had been good if reserved to a stranger; but here it was annexed to an interest, and not merely collateral, and the assignees might execute it. The Court also conceived that *assignees* included assignees in law, as well as in fact; but that the tenant in tail having devised the term, the devisee was an assignee, and the power, in the greatest strictness of acceptation, was *in fieri*, and consequently must go to his executors, and by the same reason to their assignees. (*a*)

79. [When the power is *equivalent to absolute ownership*, and *does not involve any personal confidence*, it may be *executed by attorney* in the same manner as a conveyance of the fee simple. (*b*)

80. In like manner where an estate is limited to such uses as A shall appoint, he may, and it is every day's practice, limit the estate to such uses as B shall appoint. The power is equivalent to an estate in fee simple; it is merely a species of ownership, and no delegation of a personal trust or confidence.] (*c*)

81. An instrument may, in some cases, take effect, either as an appointment of a use, or as a common-law conveyance, where the person who conveys has a power of appointment, with an estate in fee simple in default of appointment, [the rule being, that the *instrument shall be construed either as an appointment of the use*, or a *conveyance of the interest, as will best effectuate the intention of the parties.*] Thus in Sir E. Clere's case, it was resolved, that where a feoffment was made to the use of such person and persons as the feoffor should appoint, and until appointment to the use of himself and his heirs; if in such a case the feoffor devised the land by will (having a power to devise it) as owner, without any reference to his power, it would pass as a devise, by the will, and not as appointed under *the power; for the testator had an estate devisa- *213

(*a*) How *v.* Whitfield, 1 Vent. 338. 2 Show. 57. 1 Freem. 476. W. Jones, 110.
(*b*) Anon. Dy. 288 a. pl. 30.
(*c*) Sugd. Pow. 203, 5th ed.

ble in him, and also a power to limit a use; and he had his election, to pursue whichever of them he chose. So that when he devised the land itself, without any reference to his power, he showed his intention to pass the estate by his will, as owner of the land, and not to limit a use under his power. (*a*)

82. In a subsequent case, Lord Hobart said, that where an interest and an authority meet, if the party declare clearly his will to be, that this act shall take effect by his authority or power, there it shall prevail against the interest; for *modus et conventio vincunt legem.* And, therefore, in Sir E. Clere's case, it was agreed, that if the devisor had recited his power, and had relied upon that, all would have passed by express declaration of the party himself; nay, more, though the party do not make an express declaration, yet if this act do import a necessity to work by his power, or else to be wholly void, the benignity of the law will give way, to effect the meaning of the party. (*b*)

83. This last proposition is founded on the determination in Sir E. Clere's case; in which it appeared, that C. H. being seised of three acres of land, held *in capite*, made a feoffment in fee of two of them, to the use of his wife for life; afterwards made a feoffment of the third acre, to the use of such person and persons, and for such estate and estates, as he should limit and appoint by his last will; afterwards by his will he devised the said acre to A. B. in fee. It was determined, that as C. H. could not, as owner of the land, devise any part of the residue by his will, therefore the will operated as an appointment under the power; for otherwise it could have no effect. (*c*)

84. By the settlement made on the marriage of Thomas and Elizabeth Cox, in 1777, a power of revoking the uses of the settlement, with the consent of the trustees, was given to Cox and his wife; so as before such revocation, they should convey and assure other lands of equal or better value, in lieu thereof, to the same uses. By indentures of lease and release, dated in 1784, a capital messuage and other premises were conveyed to a trustee and his heirs, to hold to him and his heirs, to the use of such person or persons, and for such estate or estates, interest or interests, and with, under, and subject to such powers, provisoes,

(*a*) *Infra*, s. 83. 6 Rep. 18 a. Cro. Eliz. 877. Cro. Jac. 31. 1 Inst. 111 b.
(*b*) Hob. 160.
(*c*) 6 Rep. 17 b. Cross *v.* Hudson, *infra*, c. 19.

and agreements, as Thomas Cox should by deed or writing, under his hand and seal, limit and appoint; and in default thereof, to *the use of the said Thomas Cox, his heirs, *214 and assigns. In 1792, Thomas Cox entered into a contract to sell the estates comprised in the settlement of 1777; and by indentures of lease and release dated in 1792, Thomas Cox, in pursuance of all powers in him vested, did, with the consent of the surviving trustees in the marriage settlement, grant, bargain, sell, aliene, release, and confirm, limit, declare, and appoint; and the said Thomas Cox did, with the like consent and approbation, convey and assure to the said surviving trustees, their heirs and assigns, the said capital messuage comprised in the indenture of 1784; to hold to them, their heirs and assigns, to and for the same uses, trusts, intents, and purposes, as were declared in the settlement of 1777. Thomas Cox and his wife revoked the settlement. Some doubts having arisen upon the title, with respect to the value of the substituted estates, and also upon the supposition that the indenture of August, 1792, was intended to operate as an execution of the power, and therefore it was doubtful whether the legal estate did not vest in the trustees, in which case the uses declared thereon would be void at law, and good only as trusts in equity, the purchaser declined to complete his contract; upon which a bill was filed against him for a specific performance, and the usual order was obtained, referring it to the Master to inquire whether a good title could be made. The Master reported, that the substituted estates were of greater value than the estates comprised in the marriage settlement; and that the plaintiff could make a good title to the estates comprised in the agreement. Exceptions were taken to this report; and in support of them, it was observed, that Thomas Cox, in the release of 1792, used words applying to the conveyance of an estate in fee simple, and also to the execution of a power of appointment; that such a union was very unapt and improper; but that the instrument, though inaccurate, amounted to a complete execution of the power; and that then, the other words, importing the conveyance of an interest, were completely inoperative. Considering it then as the execution of a power, the necessary effect of it was to vest the legal estate in trustees;

and then the objection arose; the estates of the persons beneficially interested being merely equitable, in which respect there was a material deviation from the settlement, which vested the legal estate in the persons beneficially interested. (*a*)

215* *Sir R. P. Arden, M. R.:—"The plaintiff having entered into this contract, has conveyed the substituted estates by the deeds of 1792, in pursuance of all powers in him vested, and containing words both of conveyance and of appointment. This was preparatory to the revocation of the uses of the settlement, and to enable the plaintiff and his wife to revoke them under the power. The question is, whether, under this deed, there

216* is a *good execution of the condition in the proviso; or in other words, whether, by the deeds, the plaintiff had legally conveyed to the trustees in the settlement this other estate, exactly in the same manner, and to the same uses, as the estate comprised in the settlement. The objection is entirely technical, and certainly very nice, and I think a little too refined; though an objection of that sort certainly may be fairly made; and I will not find fault with a purchaser for taking the opinion of the Court upon it, if gentlemen of great character really state it as a fair ground of objection. The objection arises from the mode in which the estate substituted was conveyed to the plaintiff, which was to the use of such person or persons, and for such estate or estates, interest or interests, and with, under, and subject to such powers, provisoes, and agreements as he should, by deed or writing under his hand and seal, limit, declare, or appoint; and in default thereof, to the use of him, his heirs and assigns. This, therefore, was vested in him at the time of the substitution; and the mode which he takes for that purpose is, not by expressly declaring that in pursuance of the power he appoints, but by this conveyance of lease and release; in which he uses words that cannot at all apply to the power; and as he had both a power and an interest, it is now said, to invalidate the deed, the Court must say he did this in execution of his power only, and not to convey his interest; that it must be referred only to the power, though the trustees are in possession by virtue of the lease, which was perfectly nugatory, if he meant only to execute his power. That

(*a*) Cox *v.* Chamberlain, 4 Ves. 632. Tit. 12, c. 1. *Infra*, s. 93.

is going out of the way to raise objections; which the Court is in the habit of very much discouraging. I will not determine whether it would not have been a fatal objection if it had been an execution of the power, vesting a trust estate, instead of the legal estate under the settlement; unquestionably it would be so at law.

I am clearly of opinion, upon every principle upon which the Court acts with regard to the construction of conveyances, that it would be monstrous in this case to hold that, where there is a power and an interest, and the act being equivocal, it is doubtful whether he acted under the one or the other, the Court should adopt that which would defeat the instrument. But this case goes further, for the act is not equivocal; the party has made use of words that have no reference to the execution of a power. *I am of opinion, therefore, that this is an ex- *217 ceedingly good title." (*a*)

85. [The case of Roach *v.* Wadham would seem to be in opposition to that of Cox *v.* Chamberlain, though in each case the Court professed to decide upon the intention. In the former case, an estate was conveyed to one Coates, his heirs and assigns, to hold unto the said Coates, his heirs and assigns, to the use of such person or persons, for such estates, &c., as Watts, the purchaser, should, by any deed or deeds, writing or writings, under his hand and seal, to be by him duly made and executed, in the presence of, and attested by two or more credible witnesses, or by his will, &c., limit, direct or appoint, give or devise, the same. In default of such direction, &c., to the use of Watts, his heirs and assigns, forever. By this deed, a perpetual rent was reserved to the vendors, and Watts covenanted with the vendors for payment of it. Afterwards, by indentures of lease and release, Coates (by direction of Watts) did (according to his estate and interest) bargain, sell, and release; and Watts did grant, bargain, sell, aliene, release, ratify, and confirm; and also limit, direct, and appoint the estate in question, *and all his estate, right, &c.*, therein, unto Wadham and Stevens, (purchasers of the estate,) and Powell, a trustee, to bar dower; to hold unto Wadham, Stevens, and Powell, their heirs and assigns, to the use of Wadham, Stevens, and Powell, and the heirs and assigns

(*a*) *Vide* 7 Ves. 582. 10 Ves. 257.

of Wadham and Stevens, forever, as tenants in common, in trust as to the estate of Powell, for Wadham and Stevens, their heirs and assigns, as tenants in common, subject to the perpetual rent. And covenants were inserted from Wadham and Stevens, to Watts, to pay the rent and indemnify him from it; but Wadham did not execute the deeds. (*a*)

The question was, whether the estate, conveyed to Wadham and Stevens and their trustee, was derived out of the interest of Watts, so as to make them liable in an action of covenant for the rent, as his assignees; or whether the estate took effect under his power; in which case it was admitted they were not bound by the covenants entered into by Watts.

It was decided that the instruments operated as an exercise of the power; and, consequently, that the purchasers from Watts were not liable to an action of covenant for non-payment of the perpetual rent. The Court said: "It ought to appear 218* very *clearly from the deeds, that the conveyance, or the covenants therein, could not take effect, unless it operated as a conveyance out of the interest, and not by way of appointment, in order to induce the Court to determine, that, where the trustee to uses, in a conveyance, releases to a purchaser, it shall not operate as an appointment. Had it been the intention of the parties that the estate, which Wadham was to take, should be derived out of the interest which Watts had, it would have been wholly unnecessary that Coates should have been a party to the deed; his being made a party to it shows that something was to be taken by way of appointment; and if any thing, there is nothing from whence there can be collected an intention that less than the whole should pass by those means; the reason for which is obvious, as it might prevent such objections to the title as might be made, if it were derived immediately from Watts."

86. In the late case of Wynne *v.* Griffith, an estate had been limited to such uses as H. Roberts, and his wife Mary Roberts, and Catherine Roberts, should appoint. In default of such appointment, to such uses as the other three, in case they should survive Catherine Roberts, should appoint. In default of such appointment, as to part, to Catherine Roberts, for life, and as to

(*a*) 6 East, 289. (See 1 Sugd. Pow. 452, 6th ed.)

all, (subject to her life-interest in part,) to such uses as H. Roberts should appoint; and in default of appointment, to him in fee. All the four joined in a marriage settlement, by lease and release; and by the release, they *granted*, bargained, sold, *released*, and confirmed, directed, limited, and *appointed* unto four other persons (in their possession by virtue of the lease for a year, &c.,) the estate in settlement, to hold the same to them, their heirs and assigns, to the same uses, &c. as the estate then stood limited to, until the marriage; and after the marriage, to uses in strict settlement, with regular limitations to the trustees to preserve contingent remainders, and with a limitation of a term of 500 years to them. It was held that the last-mentioned deed operated as a *conveyance of the interest*, and not as an *execution of the power*. (*a*)

87. In this case, Sir Edward Sugden says: "It was observed that Catherine Roberts and H. Roberts could convey the fee without reference to the power, and that neither of the powers could be executed without the concurrence of both or one of them; and, *consequently, after the conveyance of *219 their estate, the powers never could be executed. The *intention* required that the deed should not operate as an exercise of the power in the four, because the old uses, until the marriage, would have changed their character, and become merely equitable, and the intended uses, after the marriage, would also have been equitable. As, therefore, two of the conveying parties had the fee in them, the deed, in favor of the intention, was held to operate as a conveyance of the interest. Upon the case coming on at the Rolls, upon the certificate of the Court of Common Pleas, it was argued that, by giving effect to the instrument as an execution of the power, H. Roberts's wife might have become dowable, contrary to the intention; and thereupon a case was sent to the Court of King's Bench, who concurred in the judgment of the Court of Common Pleas; and upon the case coming back again, the purchaser was decreed specifically to perform the agreement."] (*b*)

88. It is now the usual practice, where a person has a power and an interest, for him to make an appointment in pursuance of

(*a*) 8 Bing. 179. (1 Sugd. Pow. 456, 6th ed.)

(*b*) Sugd. Pow. 318, 5th ed. (1 Sugd. Pow. 457, 6th ed.) 5 Bar. & Cress. 923. 1 Russ. 283.

his power, and in the same deed, by a new witnessing part, to convey the lands by lease and release.

89. With respect to *the effects attending the execution of a power*, it has been stated that, where a power is executed, the former uses and estates cease, and a new use springs up to the appointee, which is derived from the seisin of the releasees or trustees, to which the statute immediately transfers the possession, and by that means the appointee acquires the legal estate, without entry or claim. (*a*)

90. Although estates, arising from the execution of powers, owe their commencement to the deed of appointment, yet the appointee under the power does not derive his title from the appointor, or out of the estate whereof the appointor is seised, but comes in directly under the conveyance by which the power was created; and the uses created by the appointment being, in order, prior to the uses limited by the original conveyance, which only take place in the meantime, and until the appointment is made, such new uses precede them; and the appointment operates by relation from the time when the original conveyance was executed, just as if the estate, created by the appointment, had been actually limited in such original conveyance. (*b*)

220 * * 91. It follows, that a right to dower may be defeated by the execution of a power. This was long doubted, but has been lately settled, by a determination of the Court of King's Bench, on a case sent there by the Vice Chancellor. (*c*)

92. [Consistently with the decision in Ray *v.* Pung, the Court of King's Bench determined, in the later case of Doe *v.* Jones, that the lien of a judgment creditor was defeated by an execution of the power. In that case, an estate was conveyed in 1826, to such uses as A should by deed appoint, and in default of appointment, to him for life, with the usual limitations to bar dower. A judgment had been entered up against A in 1822, at the suit of B. By indenture, dated in March, 1827, A, in execution of the power of appointment reserved by the deed of 1826, appointed the estate to C, a mortgagee, for 500 years, to commence immediately, for securing £4000, and interest. In December, 1827, the judgment creditor sued out a writ of *elegit*

(*a*) Tit. 11, c. 4. 10 Ves. 255. (4 Kent, Comm. 337.)

(*b*) 1 Inst. 379 b, n. 1. 2 Atk. 565. 2 Vez. 78. Venables *v.* Morris, 7 T. R. 342. *Infra*, c. 22.

(*c*) Ray *v.* Pung, 5 Barn. & Ald. 561. *Supra*, ch. 13, s. 8.

upon his judgment. Lord Tenterden, C. J., held that the lien of the judgment creditor was defeated by the appointment to the mortgagee.] (*a*)

93. *An appointment in pursuance of a power operates under the Statute of Uses*, not as a conveyance of the land, but *as a substitution of a new use*, in the place of a former one; from which it follows, that if an appointment be made under a power to A and his heirs, to the use of B and his heirs, it is a limitation of a use upon a use; consequently B only takes a trust estate. It is therefore the [correct] practice, where an appointment is made to particular uses, to appoint the lands, not to trustees, to the uses intended, as in the case of a release, but at once to the particular uses intended. (*b*)

94. Where a person settles his estate to the use of himself for life, remainder over, reserving to himself a power of revocation, and executes his power [by a general revocation], he becomes immediately seised of his former estate, without any entry or claim; because, as he is already in possession, he cannot enter on himself; and the revocation is stronger than any claim can be. (*c*)

95. It was resolved in Digges's case, that other uses might be limited or raised in the same conveyance by which the former uses were revoked; for inasmuch as the ancient uses cease, *ipso facto*, by the revocation, without claim or other act, the *law will adjudge priority of operation of one and the *221 same deed, although it be sealed and delivered at one and the same instant; therefore, in construction of law, it shall first be a revocation and cesser of the ancient uses, then a limitation and raising of the new one; for the best construction of the Statute of Uses was, to make them subject to the rules of the common law; according to which, if two acts were done by one and the same means, and took place in one and the same instant, the law would so construe them, that that act should be taken to precede, which would give efficacy to the entire instrument. (*d*)

96. The execution of a power *will not however defeat an estate, previously created* by the person who executes it.

97. An estate was limited, in consideration of marriage, to A, for life, &c., and a power was given to A, with the consent of

(*a*) 10 B. & Cr. 459.
(*b*) (1 Sugd. Pow. 240, 6th ed.)
(*c*) 1 Inst. 218 b. 1 Rep. 174 a.
(*d*) 1 Rep. 174 a. Fitzwilliam's case, 6 Rep. 33.

the trustees, to revoke all the uses. A conveyed away his life estate, for securing an annuity, to a person for ninety-nine years, if he should so long live; and afterwards, with the consent of the trustees, he revoked all the uses of the settlement. It was resolved that this revocation did not affect the estate granted, for securing the annuity. (*a*)

(*a*) Goodright *v.* Cator, 2 Doug. 477.

CHAP. XVIII.

WHERE EQUITY WILL SUPPORT A DEFECTIVE EXECUTION OF A POWER.[1]

SECT. 1. *Equity will support a defective Execution of a Power.*
2. *In favor of a Wife.*
9. *In favor of a Husband.*
12. *In favor of Children.*
15. *Though provided for.*
16. *In favor of Creditors.*
SECT. 17. *And of Purchasers for a valuable Consideration.*
20. *But not for Volunteers.*
22. *Nor where there is Fraud.*
24. *Where a complete Execution is prevented by Accident.*
25. *A Non-execution will not be supplied.*

SECTION 1. We have seen that the courts of law construed powers strictly, and required that, in the execution of them, every circumstance prescribed be complied with; but the *courts of equity* have assumed a jurisdiction in cases of this kind, and *supplied a defective execution of a power* in several cases:—I. *Where there has been a consideration;* as for securing a jointure to a wife, or a sum of money to a husband; or making a provision for younger children, or for payment of debts; and no better (equity) on the other side. II. *Where there is any fraud;* or the party is guilty of any deceit or falsehood, by which the execution is prevented; for the person in remainder shall not take advantage of his own wrong. III. *Where a complete execution is prevented by accident;* for it would be unconscionable in the remainder man to take advantage of these, provided the person having the power does all he can towards its execution.

2. It has been determined in several cases that *a covenant, in marriage articles, to settle a jointure*, under a power, *on an intended wife*, should be deemed a good execution of the power,

[1] For a more complete view of this branch of the law of Real Property, which seems with quite as much propriety to belong to a treatise on the jurisprudence of Equity, the student is referred to Sugden on Powers, Vol. II. ch. 10 and 11, p. 94–214, 6th ed. Kent's Commentaries, Vol. IV. Lect. 62, p. 339–346; Story on Equity Jurisprudence, Vol. I. §§ 169–178.

because a wife is considered, in equity, as a purchaser for
223 * a * valuable consideration of her jointure; or of whatever else is stipulated, before marriage, for her benefit.

3. Lord Clifford being tenant for life, with power to make a jointure, not exceeding £1000 a year, covenanted on his marriage with Lady A. Berkeley, to settle lands of £1000 a year on her; and accordingly after the marriage he settled part of the premises within the power on his lady for life, with a covenant that they were of the yearly value of £1000, and afterwards died; but these lands being only of the yearly value of £400, on a bill brought by the widow, there being lands of £1000 a year within the power, it was decreed, that a commission should be awarded to add lands to those formerly settled, so as to make up £1000 a year. (*a*)

4. A tenant for life, with a power of appointing a jointure of £100 a year, appointed £100 a year to his wife for her jointure, out of a particular estate; and covenanted, in case the value should be defective, to make it up out of his other estate. The estate being defective, the widow brought her bill to have it supplied out of the other estate. A decree was made accordingly; and it was held by the Lord Keeper, and the Master of the Rolls, that whenever a conveyance is made upon a good consideration, if there be any defect in the execution of it, the Court of Chancery has always supplied the defect, particularly in the case of a power, as where any circumstances were omitted in the execution of it: and one reason given was, because the circumstances were imposed only that the party might not be surprised in the execution of it; and it was further held, that payment of debts, provision for a wife and children, marriage or purchases, were considerations for which the court had supplied such defects. (*b*)

5. Gregory Alford settled land on himself for life, remainder to his wife for life, remainder to his first and other sons in tail, remainder to Francis Alford for life, &c.; with power to Francis Alford, after the death of Gregory and his wife, or any after-taken wife of Gregory, to settle so much of the premises, not exceeding £100 a year, in jointure to a wife. Francis Alford, in

(*a*) Clifford *v.* Burlington, cited 2 P. Wms. 229. 2 Vern. 379.
(*b*) Fothergill *v.* Fothergill, 2 Freem. 256.

the lifetime of Gregory, covenanted in consideration of marriage, to settle lands of £100 a year upon his then intended wife; and afterwards Gregory Alford and his wife died without issue; and then Francis Alford died without issue, whereby the premises *went to the remainder-man. The widow of *224 Francis Alford having brought her bill against the remainder-man, to make good the jointure, it was decreed by Sir John Trevor, M. R., on considering many precedents, that the covenant to make this jointure was a good execution of the power; and that the wife was well entitled to the £100 a year, and to all the arrears from her husband's death. (*a*)

It is observable, that Francis Alford entered into this covenant in the lifetime of Gregory, so that it might be reckoned a sort of strain to call this an execution of the power, before the very commencement thereof; but it showed how much the powers and the execution of them were favored, when for a valuable consideration.

6. Lord Coventry being tenant for life under his father's will, with a power, by any writing under his hand and seal, to settle any part of the estates comprised in the will, not exceeding £500 a year on any woman he should marry, for her jointure; so as such wife brought a portion equivalent to such a jointure. Lord Coventry, in consideration of a marriage, and £10,000 portion, by articles previous to the marriage, covenanted with trustees, according to the power given to him by his father's will, or otherwise, to settle lands of the value of £500 a year upon his intended wife, as her jointure. The marriage was solemnized; and soon after Lord Coventry went to his country seat, and gave the articles to his steward, with directions to look over his rental, and find out an unincumbered part of his estate to settle as a jointure. A part of the estate being fixed upon, and a particular made thereof, a settlement and appointment of it was accordingly drawn and engrossed, and left with Lord Coventry's steward for execution. From various accidents, the execution of this deed was delayed, and Lord Coventry died without having executed it. On a bill brought by the widow against the remainder-man, under the will, and the personal representatives of Lord Coventry, the principal question was whether the covenant con-

(*a*) Alford *v.* Alford, cited 2 P. Wms. 230.

tained in the marriage articles should be deemed a good execution of the power in equity. (*a*)

Lord Macclesfield, Sir Joseph Jekyll, M. R., Baron Price, and Baron Gilbert, were clearly of opinion, that the covenant contained in the marriage articles operated, in equity, as an execution of the power; and a charge and lien on the remain-
225 * der. * And the Court declared, that the deed of settlement having been prepared and engrossed by the direction of Lord Coventry, the same ought to be taken to be a specification of the lands to be settled on the plaintiff; and the lands therein mentioned ought to be bound thereby, and by the marriage articles, although the said deeds of settlement were not actually signed and sealed by Lord Coventry.

7. A power *expressly directed to be executed by deed*, will in equity be deemed to be *well executed by a will where it is in favor of a wife.*

8. A husband, by virtue of a settlement made upon him by an ancestor, was tenant for life, with remainder to his first and other sons in tail male, with a power to the husband to make a jointure on his wife, by a deed under his hand and seal. The husband having made no provision for his wife, and being in the Isle of Man, by his last will under his hand and seal, devised part of the lands within the power to his wife for her life. It was objected, that this conveyance, being by a will, was not warranted by the power, which directed that it should be by deed; and a will was a voluntary conveyance, and therefore not to be aided in a court of equity. But Sir Joseph Jekyll said, this was a provision for a wife who had none before; and within the same reason as a provision for a child not before provided for. And as a court of equity would, had this been the case of a copyhold devised, have supplied the want of a surrender; so where there was a defective execution of a power, either for payment of debts, or provision for a wife or children unprovided for, he would supply any defect of this nature. The legal estate being in trustees, they were decreed to convey an estate to the widow for life, in the lands devised to her by her husband's will. (*b*)

9. A court of equity will also supply a defect in *an appointment made by a woman in favor of an intended husband.*

(*a*) Coventry *v.* Coventry, Max. in Eq. Appendix. 2 P. Wms. 222.
(*b*) Tollett *v.* Tollett, 2 P. Wms. 489. Holt *v.* Holt, 2 P. Wms. 648.

10. A copyhold estate was surrendered by C. Layer and Elizabeth his wife, to the use of Elizabeth for life, and afterwards to such uses as she, by any writing, or by her last will attested by three witnesses, should appoint. Upon the death of C. Layer, Elizabeth did, by deed or writing attested only by two witnesses, upon a marriage agreed to be had between her and one Cotter, covenant to surrender the premises to the use of her intended husband and herself, and the heir of Cotter; who cove-
* nanted on his part to settle an annuity of £30 a year on * 226
the said Elizabeth for life. It was objected, that these articles by Elizabeth Layer, to settle the copyhold premises on her second husband, were attested by two witnesses only, so not pursuant to the power, and consequently void. But Lord King said, these articles being for a valuable consideration, namely, that of marriage, though not in strictness pursuant to the power, he should supply the want of circumstances, in the same manner as he would the want of a surrender. (*a*)

11. William Pitt married Mrs. Speke, and by the marriage articles it was covenanted, that if there should be one son only, and no younger children, and the wife should survive the husband, she should have the power of disposing of £4000 by deed or will, executed in the presence of three witnesses, to any person she should appoint; and this sum was to be charged upon the real estate of the husband. Mr. Pitt died, leaving only one son, and Mr. Speke married the widow; but before her second marriage, she, by articles executed in the presence of two witnesses only, appointed the sum of £2000 out of the £4000 to be for the use and benefit of her intended husband, during the coverture. (*b*)

Lord Hardwicke said, the question was, whether the articles entered into upon Mrs. Speke's marriage with Mr. Speke amounted to an appointment within the power. He was of opinion that it was a good appointment of £2000 for the benefit of Mr. Speke: and notwithstanding it was insisted that it was a defective appointment, because there were only two witnesses, yet the Court of Chancery would supply the defect, where it was executed for a valuable consideration; much more where it was an execution of a trust only; and though the appointment was inaccurately

(*a*) Cotter *v.* Layer, 2 P. Wms. 623. (*b*) Sergeson *v.* Sealey, 2 Atk. 412.

expressed, and in an informal manner, it should still amount to a grant of the £2000 to Mr. Speke.

12. A *covenant* will, in equity, be deemed a good execution of a power, where it is *entered into for the benefit of younger children;* because parents are under a moral obligation to provide for them.

13. A person settles lands to the use of himself for life, and then, as to part, to his wife for life, for her jointure, then to the issue male of his own body, with several remainders over; with a proviso, that if he should have any younger children, it
227 * should *be lawful for him, by deed or will, executed in the presence of two or more credible witnesses, to limit and appoint any of the said lands, except those limited in jointure, to such persons and for such estates as he should think fit, for raising £500 a-piece for younger children; to be paid at such times, and in such manner as he by such deed or will should declare; and covenanted to do accordingly. The person to whom this power was given died, leaving several younger children; but did not make any appointment. Decreed that this was a charge upon the land, and bound the issue in tail; the covenant being looked upon as an execution of the appointment, in pursuance of the power. (*a*)

14. A having a power to charge lands with £7000 for younger children, by any writing under his hand, attested by three witnesses, did, in fear of sudden death, and being absent from home, and so not being able to have a sight of the deed in which this power was contained, by a paper attested by two witnesses, charge his estate with £8000 instead of £7000, for his younger children. The Court of Chancery supplied the defect for the £7000. (*b*)

15. Lord Hardwicke has said, that, in cases of aiding the defective execution of a power, either for a wife or child, the question, whether the provision has been for a valuable consideration, or not, has never entered into the view of the Court. But *being intended for a provision*, whether voluntary or not, has been always held to entitle the Court of Chancery to give aid, to a wife or child, to carry it into execution, though defectively

(*a*) Sarth or Garth *v.* Blanfrey, Gilb. R. 166. S. C. cited 1 Str. 608. 2 Eq. Ca. Abr. 659. Sneed *v.* Sneed, Amb. 64.

(*b*) Parker *v.* Parker, cited 10 Mod. 467. Gilb. R. 168.

made. Neither is it material that a wife or child who comes for the aid of the Court, to supply a defective execution of a power, must be *entirely unprovided for.* The general rule that the husband or father are the proper judges what was the reasonable provision for a wife or child, was a good and invariable rule. And when a father had done any thing extravagant, the Court did not break through the general rule, when they set it aside, but went upon a collateral reason, that this extravagant provision, either for a wife, or one child only, was a prejudice and injury to the rest of the family; and that one branch ought not to be improperly preferred, to the ruin of the rest.

16. It was laid down by C. J. Treby, in Bath and Montague's case, that where a person, having a power of appointment, * executed it *for the payment of his debts*, but the * 228 circumstances of the power were not exactly observed, there should be relief in equity; because payment of debts was a most conscientious thing, and fit for a court of conscience to take care of, and see performed; and the precedents had all gone that way. (*a*)

17. *Purchasers for a valuable consideration* have always been favored in equity; for there the substantial part of every contract is the consideration, and for that the right is transferred. It also being a rule in equity that what ought to have been done is considered as actually done, the Court of Chancery will, upon that principle, supply any defect in the execution of a power, where there is a valuable consideration. (*b*)

18. It has been generally understood, that equity would not support a defective execution of a power of leasing against a remainder-man. It is however said, by Sir J. Trevor, M. R., that where a lease is voluntary, there, if it be not good at law, it shall not be made good in equity. But a lease is made to a tenant at rack-rent without fine, which is voluntary; yet, if the tenant has been at any considerable expense in building or improving, equity will supply the defective execution of the power. (*c*)

19. In modern times a lessee at rack-rent has been considered

(*a*) 3 Cha. Ca. 68. Pollard *v.* Greenvil, 1 Rep. in Cha. 98. Wilkes *v.* Holmes, 9 Mod. 485. (*b*) Fothergill *v.* Fothergill, 2 Freem. 256.

(*c*) *Ante*, c. 15. An. 2 Freem. 224. Sug. Pow. 381, &c. Campbell *v.* Leach, Ib. Appx. 17.

as a purchaser for a valuable consideration. And Lord Kenyon has laid it down, that a lease being granted for a valuable consideration, and merely defective in point of form; a court of equity would interfere, and direct a proper lease to be granted. (*a*)

20. It should, however, be observed, that *courts of equity will give no assistance, where both parties are volunteers.* For where the question, as to the execution of a power, lies between an appointee under a power, without consideration, and a remainder man, the latter, having a vested interest, will be clearly entitled against the former; unless the appointee can show that the remainder-man is devested, by actual execution of the power, in due form.

21. In the case of Sergeson *v.* Sealy, the widow of Mr. Pitt made a voluntary disposition of £2000, the remainder of the £4000. And Lord Hardwicke said, that this was not an appointment for a valuable consideration, but only a voluntary disposition; and, therefore, as the will under which it was
229* *given, was not executed in the presence of three witnesses, it had not pursued the power, and consequently was a void appointment. (*b*)

22. As one of the principal objects of a court of equity is to relieve against fraud and deceit, it has been long established that, *where a party interested prevents a strict compliance with the circumstances required in the execution of a power, from immoral motives*, there, if the person, who has the power, does any act that plainly evinces his intention to execute it, such act will, in equity, be deemed a good execution of it. (*c*)

23. Thus, where the remainder-man gets the deed into his possession, and will not allow the tenant for life to have a sight of it; there the tenant for life may execute conveyances, and though he does not pursue the terms of the power, yet equity will relieve, even in favor of a volunteer; because the remainder-man shall not take advantage of his own wrong, by withholding from the tenant for life the sight of his power. (*d*)

24. Another object of a court of equity is, to relieve against *all manner of accidents*, even in favor of *volunteers;* it being

(*a*) 7 Term R. 480. Shannon *v.* Bradstreet, 1 Scho. & Lefroy, 52; and see Willes, 176. 13 Ves. 576.

(*b*) *Ante*, s. 11. Bramhall *v.* Hall, 2 Eden, 220.

(*c*) 3 Cha. Ca. 87, 92, 122.

(*d*) Gilb. Cha. 306.

unconscionable for a remainder-man to take advantage of them. It was therefore agreed, in Bath and Montague's case, that if a person made a conveyance with a power of revocation, by a deed executed in the presence of four privy-counsellors; and he was sent by the King to Jamaica, where that circumstance could not possibly be complied with, equity would support a revocation without it. (*a*)

25. Although a court of equity will, in many instances, aid a *defective execution* of a power, yet it will *never interpose in the case of a non-execution of a power;* which always leaves it to the free will and election of the party to whom the power is given, either to execute it or not. For which reason equity will not say he shall execute it, or do that for him which he does not think fit to do for himself. And the intervention of death between a man's resolving to execute a power, and his actually executing it, is not of itself, even in cases where the act is of such a nature as a man is under an obligation to perform, a ground for the interposition of a court of equity in favor of the person intended to have been benefited by the doing thereof, although some steps be taken towards completing such intention. (*b*)

*26. A having a power of revocation, by any writing *230 under his hand and seal, and being desirous to provide for his daughters, prepared notes in writing, which he declared should have the effect of his last will, and which he called instruments for his counsel to draw up his last will in form. His counsel drew a writing, and had the same engrossed, leaving blanks for the names of the trustees. A died without executing this will. A bill being exhibited by the daughters, for the portion given them by these instructions, an issue was directed to try whether these notes were part of the last will of A, and a verdict was given that they were a will; whereupon the Court decreed them to be a good execution of the power. (*c*)

27. Mr. Fonblanque observes, that this case has been cited to prove that a non-execution of a power will be aided in equity; but that it is clear from the circumstance of directing an issue to try whether these notes amounted to a will, that the Court

(*a*) 3 Cha. Ca. 68. Cowp. 267.
(*b*) 2 P. Wms. 490. Arundell *v.* Phillpot, 2 Vern. 69. 3 Cha. Ca. 70.
(*c*) Smith *v.* Ashton, Finch, 273. 1 Freem. 308. 1 Cha. Ca. 264.

did not think the accident of the father's death, before he had completed his intent towards his younger children, a sufficient foundation for relief; it therefore directed a trial to ascertain whether these notes were a will; and it being found that they were, the question then was reduced to this, whether the Court could relieve the younger children, in respect that the will wanted circumstances which were required by the power to attend the execution of it; which, as between the younger children and the heir, it certainly would do; the case being, by the verdict, a case of a defective execution only. (*a*)

28. A married woman having a power of revocation and appointment, and being sick, wrote a letter to her attorney who had drawn her settlement, desiring he would prepare a deed whereby she might give the inheritance to her niece, and on the back of the letter it was written that the attorney should keep it a secret. The attorney, however, communicated this letter to the husband, and several days intervened, during which the attorney swore that he did not propose any method to the husband, or use any means, to prevent the revocation. The question was, whether this letter amounted to a revocation in equity; and it was decreed that it did not. (*b*)

29. In the case of Lassells *v.* Lord Cornwallis, Lord Keeper Wright said, the Court of Chancery had not gone so far, 231* as *where a person had a power to raise money, if he neglected to exercise that power, to do it for him; although he thought it might be reasonable enough, and agreeable to equity, in favor of creditors. But in a modern case, it was held, that where a person had a power of charging lands with £2000 which he never executed, the power could not be considered as assets for payment of debts. (*c*)

30. By the settlement made between Sir John Coghill and his son, certain estates were limited to him for life, with a power to charge them with the payment of £2000. Sir J. C. having died in debt, his creditors contended that this sum was assets, for payment of his debts. Sir W. Grant, M. R., declared that the power not having been executed, the money could not be raised. (*d*)

(*a*) Treat. of Eq. B. 1, c. 4, s. 25.
(*b*) Piggott *v.* Penrice, Com. Rep. 250. S. C. Prec. in Cha. 471.
(*c*) 2 Vern. 465.
(*d*) Holmes *v.* Coghill, 7 Ves. 499.

Upon an appeal, Lord Erskine said, the general question was, whether the sum of £2000, which Sir J. C. had power to raise, was to be considered as assets. The first ground upon which that might be maintained was, that *jus disponendi* was to be considered as property itself. If there was no case directly in point, the result of the authorities was, that a general power of disposition, not restrained as to the objects, or the mode, was in effect property; the distinction between power and property being, that the former was subject to some restraint, either as to the objects, or the mode of disposition; the latter consisting in general and unconfined dominion. Secondly. There was no doubt, where an attempt was made to execute a power in favor of creditors, but the execution was defective, the defect would be supplied. The law of the Court was also admitted, that if a power was executed in due form, but in favor of a volunteer, the Court would take the subject from that person and give it to the creditors of him who had the power. But where there was a complete want of execution, it could not be supplied for creditors. The decree was affirmed. (*a*)

31. [But where the power is *in the nature of a trust*, which it is the *duty* of the donee to execute, he is considered by a Court of Equity as a trustee for the exercise of it; and it *will not permit his negligence, accident, or other circumstances*, to disappoint the interests of those for whose benefit he is called upon to execute. (*b*)

*32. The question, what is a *power*, and what a *trust*, *232 is sometimes one of difficulty; and distinctions between the cases are very refined. (*c*) †

33. Where a person has a power of revocation, by the exercise of which he may acquire an estate in fee simple, the land will be liable to debts due to the crown. (*d*)

(*a*) 12 Ves. 206. 1 Cox, Rep. 131. George *v.* Milbanke, 9 Ves. 190.

(*b*) Brown *v.* Higgs, 8 Ves. 561, 574. Savage *v.* Carroll, 1 Ball. & B. 265.

(*c*) Harding *v.* Glyn, 1 Atk. 469. S. C. 5 Ves. 510. Duke of Marlbro' *v.* Godolphin, 2 Vez. 61. 5 Ves. 506. See 8 Ves. 576.

(*d*) Coke's case, Godb. 289. Jenk. Cent. 7 Ca. 19.

[† The recent Bankrupt Act, 6 Geo. 4, c. 16, s. 77, enacts, that all powers vested in any bankrupt, which he might legally execute *for his own benefit*, (except the right of nomination to any vacant ecclesiastical benefice,) may be executed by the assignees for the benefit of the creditors, in such manner as the bankrupt might have executed the same.]

CHAP. XIX.

HOW POWERS MAY BE EXTINGUISHED AND DESTROYED.[1]

SECT. 1. *A complete Execution.*
4. *Powers relating to the Land may be released.*
6. *Powers appendant barred by Feoffment.*
7. *By Fine and Recovery.*
8. *And by Bargain and Sale, &c.*
10. *May be suspended, or charged.*
12. *Powers in gross not barred by an innocent Conveyance of the Land.*
SECT. 14. *Unless the Estates are devested.*
18. *May be released.*
22. *Powers simply collateral, not barred by any Conveyance.*
23. *A Power may be forfeited to the Crown.*
28. *May be extinguished.*
30. *Ceases where there is no Object.*

SECTION 1. The first and most obvious mode by which powers, whether relating to the land, or collateral to it, *may be extinguished*, is *by a complete execution* of them. And it was formerly held, that even a partial execution of a power operated as an extinguishment of it. But this doctrine is not now deemed law. (*a*)

2. If a power, reserved over a legal estate, is *defectively executed* at first, it may be *executed over again*, and the last execution shall stand, the first being a mere nullity. (*b*)

3. [But where, after a first *defective* execution, a second *defective* execution is made, which was intended by itself to be a complete and valid execution, there the two executions, which taken separately are defective, shall not be taken conjointly; although being so taken, the directions of the power would be strictly complied with.] (*c*)

4. *Powers relating to the land*, whether appendant or in gross, *may be destroyed by a release* to any person having an estate of

(*a*) Zouch *v.* Woolston, *ante*, c. 16, § 42.
(*b*) Barnard. Rep. 111.
(*c*) Hawkins *v.* Kemp, 3 East, 410.

[1] See, on this subject, Sugden on Powers, Vol. I. ch. 2, § 1–5, p. 48–104, 6th ed. Kent's Commentaries, Vol. IV. Lect. 62, § 4, p. 346 *et seq.*

freehold in possession, remainder, or reversion, in the lands to which the power relates. For where powers are given to a person having an estate or interest, either present or future, in the land, the exercise of them is considered as a species of property *advantageous to him; and there is no reason *234 why he should not be allowed to depart with, or exclude himself from, the benefit of it. (*a*)

5. Francis Bunny enfeoffed Miles Hitchcock, to the use of the said Francis for life, and after to the use of David Bunny in tail, &c., with a proviso, that it should be lawful for the said Francis to alter, change, or determine any of the uses limited in the said deed. Afterwards Francis Bunny, by his deed, did remise, release, and quitclaim to the said Miles and David, the said condition, proviso, and agreement, and all his power, liberty, and authority aforesaid. It was resolved that the power was destroyed by this release. (*b*)

6. *Powers appendant* may be *barred by the feoffment of the persons to whom they are given;* because a feoffment with livery is of such force, that it excludes the feoffor not only from all present, but also from all future rights and titles. And in Albany's case, it was agreed by the Judges, that a power to revoke and limit new uses, might be utterly gone and extinguished by a feoffment. (*c*)

7. *Powers appendant* might also be *barred and extinguished by fine, or common recovery;* of which an account will be given under those titles. (*d*)

8. *Powers appendant* may also be *extinguished by any of those conveyances which derive their effect from the Statute of Uses*, and which are said to operate without transmutation of possession; as a *bargain and sale*, *covenant to stand seised*, and *lease and release.* For, whoever has an estate in the land may convey it to another; and it would be unjust that he should afterwards be admitted to avoid, or do any thing in derogation of his own act. Any assurance, therefore, of this nature, which carries the whole of the grantor's estate, operates as a total destruction of all powers appendant to it. [So that where an estate is limited to such uses as A shall appoint, in default of appoint-

(*a*) 1 Rep. 174 a.
(*b*) Albany's case, 1 Rep. 110 b.
(*c*) *Ante*, s. 5.
(*d*) But see Roper *v.* Halifax, 8 Taunt. 845.

ment to himself in fee, a conveyance of his interest would destroy the power which is appendant; or where lands are settled in trust for the separate use of A for life, remainder to such uses as she should by will appoint, in default of appointment in trust for her heirs and assigns, a conveyance by lease and release from A, she being unmarried, would destroy her power.] (*a*)

235* *9. It should, however, be observed, that a feoffment, or any other *conveyance of a part of the land*, is an *extinguishment of the power, as to that part only*; and the power remains as to the residue. (*b*)

10. Where a person having a *power appendant*, *makes a conveyance of the land, only for the purpose of creating a particular estate*, as an estate for life, or a term for years;—this only *suspends* the execution of the power, during the continuance of the estate created, [to the prejudice of the grantee or lessee.] And where such assurance only creates a *charge* on the estate, it necessarily subjects the estate to that charge.

11. Where a person, who had a power to revoke a use, made a lease for years, and levied a fine for assurance of a lease, without express use; the power of revocation was held not to be extinguished by the fine, but only suspended during the term. (*c*) †

(*a*) Inst. 342 b, n. 1. See Kirkpatrick *v.* Capel, MS. (1 Sugd. Pow. 78, 79, 6th ed.) Barton *v.* Briscoe, 1 Jac. 603. Penne *v.* Peacock, For. 41. *Infra*, s. 14.

(*b*) 1 Inst. 387 a. Hob. 313.

(*c*) Bullock *v.* Thorne, Moo. 616. Vincent *v.* Ennys, 3 Vin. Ab. 432.

[† In the former editions of this work, the case of Ren *v.* Bulkeley, 1 Doug. R. 292, was stated, to show that a power to lease was not barred by a mortgage; but that case is not now considered as law. *Vide* Sugden on Powers, 5th ed. p. 56. *Note to former edition.* (But see 1 Sugd. Pow. 58–71, 6th ed.)

[The late decision of Long *v.* Rankin, Sug. Pow. App. 5, MS. (2 Sugd. Pow. 539, App. N. 2, 6th ed.) may perhaps be considered in some measure to sanction the opinion of Lord Mansfield, in Ren *v.* Bulkeley. But the peculiarity of the case of Long *v.* Rankin depends on the wording of the power, and the circumstance, that in the conveyance of the life-estate upon which the power was appendant, there was a covenant that the grantor might exercise the power. The opinion of the Judges seemed materially influenced by the peculiar language of the power, from which they collected the intention, that when once the donee was in possession of the estate, he might exercise the power during its continuance, whether the estate was in himself or in another deriving under him.]

(Chancellor Kent approves the decision of Ld. Mansfield, in Ren *v.* Bulkeley, as

12. With respect to those powers relating to land, which are called *powers in gross*, as the estates to be created by them do not fall within the compass of the person's estate to whom they are given, *a mere alteration of that estate will not affect them.* Hence, if a tenant for life, with power to settle a jointure, or to create a term for years, to commence from his decease, conveys away his life-estate, by bargain and sale, covenant to stand seised, or lease and release; these conveyances will not destroy his power. And if he should even make a conveyance in fee, by any of these assurances, as they pass no greater estate than the grantor has a right to convey, the power would not * 236 be affected by them. (*a*)

13. A man settled lands by fine, to the use of himself for life with a clause, that if he should make a jointure to his wife, and make a lease for thirty-one years, to commence after his death, for raising £3000 for his daughters' portions, that then the cognizees should stand seised to those uses; and limited several remainders over in tail, the reversion in fee to himself. Afterwards he made a jointure, pursuant to this power, and then bargained and sold the lands to other persons in fee, by deed enrolled, in trust to raise portions. The bargainee afterwards conveyed the lands to him by feoffment. Then he made a lease for thirty-one years, to begin after his death, for raising £3000 for the portions of two of his daughters only; and he and his wife after that levied a fine, *sur cognizance de droit, &c.*, and afterwards he died. A person, by the direction of the lessee for thirty-one years, entered; and whether his entry were lawful or not, was the question. (*b*)

Lord Hale and Baron Rainsford were of opinion, that the power to make a lease for thirty-one years, to commence after the death of the lessor, was not destroyed by the bargain and sale; (contrary to the opinion of Baron Turner;) because it was a power in gross, and the estate for life had no concern in it; and yet such a power might, by apt words, be destroyed by release, or by fine, or feoffment, which carried away and included all

(*a*) Jenkins *v.* Kemis, 1 Cha. Ca. 103. (*b*) Edwards *v.* Slater, Hard. R. 410.

"more just and reasonable;" and such seems to be the opinion of Sir Edward Sugden. See 4 Kent, Comm. 347; 1 Sugd. Pow. 58, 71, 6th ed.) *Am. Ed.*

things relating to the land. But an assignment of *totum statum suum*, or other alteration of the estate for life, did not affect such a power.

14. Where a tenant for life, with power to jointure, or to create any other estate, to commence after his own, conveys away his estate *by feoffment* to a stranger and his heirs; as this species of assurance not only transfers the estate which the feoffor might lawfully pass, but also a tortious fee, it follows that *the whole inheritance is devested*, and the seisin, out of which the uses created by the power were to be fed, destroyed; by which means the power becomes extinct.[1] And if the tenant for life levied a fine, or suffered a recovery of the lands, the power would also be destroyed, for reasons which will be stated under those titles. (*a*)

15. [In Penne *v.* Peacock, on the marriage of A, her
237* estate * was conveyed to a trustee in fee, in trust to pay the rents to her separate use for life, and after her decease, in trust for such uses as she should by will appoint, and in default of appointment, to her own right heirs. She concurred with her husband in conveying the estate by demise, with a fine, to a mortgagee. It was insisted she had a bare naked power without any interest, which could not be barred by the fine. Lord Talbot held, that it was a power coupled with an interest, and annexed to her inheritance, and so destroyed by a fine; since a lease and release, or any other conveyance, will carry with them all powers that are joined to the estate. (*b*)

16. In Bickley *v.* Guest, a tenant for life, having a power to charge the estate after his death for the benefit of his children, levied a fine with proclamations. Sir John Leach, M. R., held the power extinguished by the fine. (*c*)

17. In Smith *v.* Death, an estate was devised to A for life, with remainder to such child or children of A him surviving, as

(*a*) *Ante*, c. 4. See tit. 35, ch. 10, s. 43. Tit. 35, ch. 8, s. 21, *et seq.* (*b*) For. 41.
(*c*) 1 Russ. & Myl. 440. West *v.* Berney, Ib. 431.

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[1] It may be doubted whether a power can now be extinguished in this manner, in the United States; as an alienation by the tenant for life is generally held to convey only such estate as he had, and therefore to work no forfeiture. See *ante*, tit. 3, ch. 1, § 36, note.

he should appoint, and in default of appointment, to his first son in tail, with remainders over. A and his eldest son concurred in a recovery, and Sir John Leach, V. C. decided that the power was extinguished. (*a*)

18. In Horner *v.* Swann, an estate was devised to A for life, and after her death to such of the testator's children, living at his death, as A should by will appoint; in default of appointment, to the children equally, with benefit of survivorship, in case of any dying under twenty-one. *A and the three surviving children*, all of whom had attained twenty-one, *contracted to sell* the devised estates; and, upon a bill by them for specific performance of the contract, the question was, whether A's power could be released or extinguished; and Sir Thomas Plumer, M. R., decreed the specific performance.] (*b*)

19. Where a person was tenant for life, with a general power of appointment, with *remainder* in default of appointment *to himself in fee*, and became a bankrupt, it was held, that his power was destroyed by the assignment of all his estate and interest to the assignees. (*c*) †

*20. [In Badham *v.* Mee, an estate was limited by *238 marriage settlement to the husband for life, with a power of appointing the estate to such of the sons as he should by deed or will appoint, and in default of appointment, to the first and other sons of the marriage successively, in tail general, with remainder to the right heirs of the husband. The husband became bankrupt, and all his property was conveyed in the usual way, by bargain and sale to his assignees. He subsequently appointed the estate, in exercise of his power, to his son in fee, subject to his own life-estate. Upon a case, sent by the Master of the Rolls

(*a*) 5 Mad. 371. (*b*) 1 Turn. & Russ. 430.
(*c*) Doe *v.* Britain, 2 Barn. & Ald. 93. Anon. Lofft, 71.

[† In Thorpe *v.* Goodall, 17 Ves. 368, 460, 1 Rose, 40, Lord Eldon held, that he could not compel the execution by a bankrupt of a general power of appointment; and his opinion appears to have been, that the power did not vest in the assignees; and Sir John Leach, V. C., appears to have been of the same opinion. See Sugden on Powers, 5th edit. pp. 191, 102.—*Note to former edition.* By stat. 6 Geo. 4, c. 16, s. 77, it is enacted, that all powers vested in any bankrupt, which he might legally execute, for his own benefit, (except the right of nomination to any vacant ecclesiastical benefice,) may be executed by the assignees, for the benefit of the creditors, in such manner, as the bankrupt might have executed the same.]

for the opinion of the Court of C. B., the Judges decided, that the son took nothing by the appointment, but was entitled to the estate tail, under the settlement. It was argued in support of the appointment, that the bargain and sale of the commissioners was only an innocent conveyance, and did not destroy the power as a mere transfer of the bankrupt's interest.] (a)

21. Where a tenant for life, with powers of leasing, jointuring, and charging, is obliged to part with the beneficial interest in the estate, he conveys it to a person for ninety-nine years, if he shall so long live; by which means the freehold remains still in him, and his powers are not destroyed. And where he joined with the remainder-man in suffering a common recovery; the conveyance to make a tenant to the *præcipe* was usually during the joint lives of the tenant for life, and the intended tenant to the *præcipe*; by which means the reversion remained in the tenant for life, and all his powers were thereby preserved. (b)

22. At common law, *a naked authority is not barred by a release or any other conveyance of the land.* Thus Lord Coke says, if a man by his will devised that his executors should sell his lands, and died; if the executors released all their right and title to the land to the heir, this was void; for that they had neither right nor title to the land, but only a bare authority. Upon the introduction of uses, this doctrine was adhered to; and in 15 Hen. VII., where *cestui que use* devised that his feoffees should sell his land, and died; and afterwards the feoffees
239 * made * a feoffment over; it was held, that the feoffees might sell, against their own feoffment; because the power to sell was merely collateral to the right to the land. (c)

23. When powers of revocation and appointment were introduced, the Judges, reasoning by analogy from the preceding cases, laid it down, *that powers simply collateral to the land could not be released*, nor were they *extinguished or destroyed* by a feoffment, or any other conveyance of the land: for these powers being given to strangers, for the benefit of some third person, the extinction of them would be injurious to that person.

24. Thus, it is said by Popham, Ch. Just., in Digge's case, that

(a) 7 Bing. 695. (b) 1 Inst. 203 b. n. 1.
(c) 1 Inst. 265 b. 1 Rep. 111 a.

if a feoffment in fee be made to A to divers uses, with a proviso, that if B shall revoke, the uses shall cease; there B cannot release his power; and a feoffment by him shall not extinguish it; for the power of B is merely collateral, and the land doth not move from him, nor shall the party be in by him, nor under him; and neither a fine nor a recovery will in this case operate as a bar to the power. (*a*)

25. A power of revocation may, in some cases, be *forfeited to the Crown, by an attainder for high treason;* and by that means become vested in the King. Thus, if a person is tenant for life, with a power of revocation over the estates in remainder, and is attainted of high treason, his estate for life, together with his power of revocation, will both be forfeited.[1] But if the execution of the power be attended with circumstances inseparably annexed to the person of him to whom the power is given, it cannot be executed by the Crown.

26. Thomas, Duke of Norfolk, conveyed his estate to trustees, to the use of himself for life, remainder to the use of his eldest son in tail, with several remainders over, with a proviso, that it should be lawful for the duke to revoke those uses, by any writing under his proper hand, subscribed by three witnesses. The duke was afterwards attainted of high treason; and it was determined that this power of revocation, although forfeited, could not be executed by Queen Elizabeth; because the circumstances, prescribed in the execution of the power, were so inseparably annexed to the person of the duke, that no one but himself could execute them. (*b*)

27. On the other hand, if the execution of a power be not attended with circumstances inseparably annexed to the person * of him to whom the power is given; there, in *240 the case of an attainder for treason, the power may be executed by the Crown. (*c*)

(*a*) 1 Rep. 174 a. Moo. 605. *Vide* tit. 35 and 36.
(*b*) Duke of Norfolk's case, cited 7 Rep. 13 a.
(*c*) 1 Hale P. C. 245. *Vide* Hardwin *v.* Warner, Palm. 429. Lat. 24. Smith *v.* Wheeler, 1 Vent. 130. Englefield's case, 7 Rep. 11.

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[1] Whether a power can be forfeited in this manner, in the United States, *quære;* and see *ante*, tit. 1, § 67, note, and tit. 30, § 11, note.

241 * * 28. A power *given to a person having a particular estate* in the land, is merged, [or rather *extinguished*,] *by his acquisition of the fee simple.*

29. An estate was limited to John Hay for life, remainder to his wife for life, remainder to the children of the marriage in tail, remainder to the survivor of the husband and wife in fee; with a power to the husband, by deed or will, to charge the lands with a rent. There was no issue; and the husband, in the lifetime of his wife, by will, reciting the power, devised in execution of his power, and of all other powers, a rent of £100 a year; and survived his wife. Lord Thurlow said, the power was merged; but he was also of opinion, that though the power was gone, and the will purported to be an execution of the power, yet as he evidently meant the charge should take place on the estate at all events, it must be sustained as a charge on the estate, out of the interest he had at his death. (*a*)[1]

30. Where there is *no object for the execution of a power*, it of course ceases.

31. Thus where a person had a power given him by his marriage settlement, to appoint the lands to the children of the marriage, and for default of appointment, then to all the children equally; and there was but one child; an appointment to that child was held to be void, because he took under the limitation in the settlement. (*b*)

32. [We may here observe, that *where an object of a limited power dies before any appointment is made*, or before the ap-

(*a*) Cross *v.* Hudson, 3 Bro. C. C. 30. 10 Ves. 292.

(*b*) Roe *v.* Dunt, 2 Wils. R. 336. *Vide supra*, c. 17, s. 51. Bray *v.* Hammersley, 3 Sim. 518; also Campbell *v.* Sandys, 1 Sch. & Lef. 281. Folkes *v.* Western, 9 Ves. 456.

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[1] The opinion of Ld. Thurlow in this case, that where an estate is ultimately limited in fee to the donee of the power, the power is absorbed by the fee, and is extinct, was followed by Sir Wm. Grant, in Maundrell *v.* Maundrell, 7 Ves. 567, and is approved by Chancellor Kent, as being "the good sense and reason of the thing." 4 Kent, Comm. 348. And see Wilson *v.* Troup, 2 Cowen, 195, acc. But upon an appeal from the decision of Sir Wm. Grant to Lord Eldon, 10 Ves. 236, it was clearly held by the latter upon the authority of adjudged cases and the practice of conveyancers, that a general power of appointment over the whole estate may well subsist in the same person who has the fee simple. See 1 Sugd. Pow. 109–113, 6th ed. *Post*, tit. 39, § 92–94.

pointment (being by will) is completed by the donee's death, there *the interest of the object of the power ceases,* except so far as he is entitled in default of appointment.] (*a*)

(*a*) Vane *v.* Lord Dungannon, 2 Sch. & Lef. 118.

CHAP. XX.

CONSTRUCTION OF DEEDS.

SECT. 1. *General Rules.*
24. *Where a Deed is uncertain, it is void.*
25. *Words sometimes rejected.*
29. *Omissions supplied.*
31. *Settlements rejected.*
33. *Some Operation is always given to a Deed.*
49. *Where the Grantee has an Election, how to take.*
52. *No Averments admitted against Deeds.*
SECT. 56. *But admitted in support of them.*
60. *And where there is an Ambiguity.*
63. *And where there is Fraud or Mistake.*
64. *A Deed may operate as an Estoppel.*
69. *Construction of Conveyances to Uses.*
73. *Of Declarations of Trust.*
75. *Of Articles of Agreement.*

SECTION 1. In the *construction of deeds*,[1] there are *two sorts of rules:* one *general*, and applicable to every kind of deed; the other *particular*, and applicable only to some particular kind of deeds, or to some part of a deed. (*a*)

2. With respect to the *first sort*, it is a *maxim* of the highest antiquity in the law, that *all deeds shall be construed favorably*; and *as near the apparent intention of the parties as possible, consistent with the rule of the law: Benignæ sunt facienda interpre-*

(*a*) Shep. Touch. 86.

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[1] In the construction of deeds, the meaning of words in common use, the force of the language, and the legal effect of the instrument, are for the Court to decide. The particular meaning of terms of art and the like, the monuments intended by certain names, and the actual extent of the boundaries, are questions for the jury. Piles *v.* Bouldin, 11 Wheat. 325; Frier *v.* Jackson, 8 Johns. 495; Hurley *v.* Morgan, 1 Dev. & Bat. 425; Hodges *v.* Strong, 10 Verm. 247. See 1 Greenl. on Evid. § 49, 277 n. And see M'Cutchen *v.* M'Cutchen, 9 Port. 650; Miller *v.* Shackleford, 4 Dana, 264; Venable *v.* M'Donald, Id. 336; Revere *v.* Leonard, 1 Mass. 91.

Where there is no controversy as to the facts in the case, the question, what land was intended to be conveyed, is a question of law. Stevens *v.* Hollister, 3 Washb. 294. But where any facts remain to be settled, the cause goes to the jury, under the direction of the Judge. Williston *v.* Morse, 10 Met. 17.

***tationes chartarum, propter simplicitatem laicorum, ut res magis valeat quam pereat.* (*a*)** [1]

(*a*) 1 Inst. 36 a. Plowd. 154, 160.

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[1] See Broom's Maxims, p. 238; 1 Inst. 36 a, 183 b. Lord Coke quotes this maxim from Bracton, l. 2, c. 39, § 6, fol. 95 a. It is also cited by Staunford, J., in Plowden, 160. *Verba intentioni, non è contra, debent inservire.* 1 Inst. 36 a. "The purpose of construction is, to *find* the meaning of the parties, not to *impose* it." 23 Am. Jur. 260. Other maxims, to the same general effect, are these: *Verba debent intelligi secundum subjectam materiam.* 1 Inst. 36 a. *In contractibus benigna, in testamentis benignior, in restitutionibus benignissima interpretatio facienda est.* Ibid. 112 b. So, in the Roman Law: *In conventionibus contrahentium, voluntatem, potius quam verba, spectari placuit.* Dig. lib. 50, tit. 16, l. 219.

The rule in the text has been clearly expounded by Ld. Ch. Just. Willes, in the following terms: "It is a known maxim in law, that *Benignæ faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat.* There is another, that *verba intentioni, et non e contra, debent inservire.* It is said in our books, that the construction of deeds ought to be favorable, and as near to the apparent intent of the parties as possibly may be, and as the law will permit; that too much regard is not to be had to the natural and proper signification of words and sentences, to prevent the simple intention of the parties from taking effect; for that the law is not nice in grants, and therefore it doth often transpose words contrary to their order, to bring them to the intent of the parties. For neither false Latin nor false English will make a deed void, if the intent of the parties doth plainly appear. I have collected these rules and maxims from Littleton, Plowden, Coke, Hobart, and Finch, persons of the greatest authority. But they are themselves so full of justice and good sense, that they do not want any authority to support them, and I do not know that they were ever yet controverted.

On the foundation of these rules, whenever it is necessary to give an opinion upon the doubtful words of a deed, the first thing we ought to inquire into is, what was the intention of the parties. If the intent be as doubtful as the words, it will be of no assistance at all. But if the intent of the parties be plain and clear, we ought, if possible, to put such a construction on the doubtful words of a deed, as will best answer the intention of the parties, and reject that construction which manifestly tends to overturn and destroy it. I admit that, though the intent of the parties be never so clear, it cannot take place contrary to the rules of law; nor can we put words in a deed, which are not there, nor put a construction on the words of a deed, directly contrary to the plain sense of them. But where the intent is plain and manifest, and the words doubtful and obscure, it is the duty of the Judges (and this is that *astutia* which is so much commended by Lord Hobart, p. 277, in the case of the Earl of Clanrickard,) to endeavor to find out such a meaning in the words as will best answer the intention of the parties." Parkhurst *v.* Smith, Willes, 332, 338. And with this agrees the Roman Law: *Semper in dubiis benigniora præferenda sunt.* Dig. lib. 50, tit. 17, l. 56. And, *Quoties in stipulationibus ambigua oratio est, commodissimum est, id accipi, quo res, de qua agitur, in tuto sit.* Dig. lib. 45, tit. 1, l. 80.

In order to ascertain the intent of the parties, the Court will consider their particular situation, the circumstances attending the transaction, the state of the country and of the thing granted, at the time of the grant. Adams *v.* Frothingham, 3 Mass. 352. And see Bridge *v.* Wellington, 1 Mass. 219; Wallis *v.* Wallis, 4 Mass. 135; Marshall *v.* Fiske, 6 Mass. 24; Pray *v.* Pierce, 7 Mass. 381; Litchfield *v.* Cudworth, 15 Pick. 23;

3. If, however, the intention of the parties be contrary to the rules of law, it will then be otherwise; for it would be highly improper and inconvenient to permit private persons to contradict the general rules of law. Thus, if a person conveys lands to another and his heirs, for twenty-one years, the executor of the grantee, and not his heir, will be entitled to the land; because it is a rule of law, that a term for years is but a chattel real, which goes to the executor. (*a*)

243* *4. *Quoties in verbis nulla ambiguitas, ibi nulla expositio contra verba expressa fienda est.*[1] And where the

(*a*) 1 Inst. 46 b. Tit. 8, c. 1, s. 23, 24.

Frost *v.* Spaulding, 19 Pick. 445; Chamberlin *v.* Crane, 1 N. Hamp. 64; 1 Greenl. on Evid. § 278, 286-295; Salisbury *v.* Andrews, 19 Pick. 250; [Reed *v.* Proprietors of Locks, &c. 8 How. U. S. 274; Irwin *v.* The United States, 16 How. U. S. 513; Derby *v.* Hall, 2 Gray, 243; Deshon *v.* Porter, 38 Maine, (3 Heath,) 293; Hadden *v.* Shoutz, 15 Ill. 581; Lowk *v.* Woods, Ib. 256; Dunn *v.* English, 3 Zabr. 126; Wolfe *v.* Searborough, 2 Ohio, N. S. 361; Baker *v.* Jordan, 3 Ib. 438.];

And where the language clearly indicates the intention of the parties, that intention will stand, though the law may prevent it being carried into effect. Deering *v.* Long Wharf, 12 Shepl. 51.

[1] This maxim is thus expounded by Tindal, C. J., in Shore *v.* Wilson, 5 Scott, N. R. 1037, 1038. "The general rule, observes a learned Judge, I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. The true interpretation, however, of every instrument, being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception from—or, perhaps, to speak more precisely, not so much an exception from, as a corollary to—the general rule above stated, that, where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party." See also Broom's Legal Maxims, p. [267.]

Other maxims are to the same effect, as to the importance of doing no violence to the language of the party. *Index animi sermo.* 5 Rep. 118. *A verbis legis non est recedendum,* Ibid. *Divinatio, non interpretatio est, quæ omninò recedit a literâ.* 2 Poth. Obl. 33, n. by Evans. But, on the other hand, *Qui hæret in literâ, hæret in cortice.* 1 Inst. 283 b. And see 23 Am. Jur. 260; Vattel, b. 2, ch. 17, § 270, p. 314, 315; 2 Smith's Lead. Cas. 293.

intention is clear, too minute a stress ought not to be laid on the strict and precise meaning of words; according to another maxim, *Qui hæret in literâ hæret in cortice.* (*a*)

5. G., Earl of Orford, having become entitled by purchase to an estate tail in certain manors, &c., which had belonged to Samuel Rolle, whose only daughter was the mother of Lord Orford, suffered a recovery thereof, to the use of himself and his heirs. Soon after, Lord O., by deeds of lease and release, reciting that he was heir at law to the said Samuel Rolle by his mother, and desirous that the same premises should continue and remain in the family and blood of the said Samuel Rolle; and to the intent that the said estates might continue in the blood of his late mother, on the part of her father the said Samuel Rolle, conveyed the same estates to a trustee, to the use of himself for life, remainder to the heirs of his body, remainder to the use of such persons as he should appoint, remainder to the right heirs of the said Samuel Rolle forever. (*b*)

Sir W. Grant, M. R., was of opinion that it was impossible to construe the words "*right heirs of Samuel Rolle*" so as to exclude Lord Orford, who was, at the time of the execution of the deed, the right heir of Samuel Rolle. And a case having been sent to the Court of K. B., three of the Judges certified, that, considering the words, "the right heirs of Samuel Rolle," were words of plain and well-known legal import, they denoted Lord Orford himself; and supposing a different construction might be put upon those words in a deed, and that they might be held to designate some other person, in order to carry into effect a manifest intention on the part of the settler, yet they did not collect with certainty, from the language of the deed, what other person the settler intended to designate by these words. Mr. Justice Bailey certified, that, considering it appeared by the deed that Lord Orford knew himself to be the then heir of Samuel

(*a*) 2 Saund. 167. (1 Inst. 147 a, 283 b. 5 Rep. 118.)
(*b*) Cholmondeley *v.* Clinton, 2 Barn. & Ald. 625.

The grammatical sense, however, is not to be adhered to where a contrary intent is apparent. Jackson *v.* Topping, 1 Wend. 388. And in order to ascertain the intent, punctuation will be resorted to, after all other means have failed; though it is at best a most fallible standard; and if the meaning is apparent on a judicial inspection of the whole deed, the punctuation will not be suffered to change it. Ewing *v.* Burnet, 11 Pet. 41, 54.

Rolle; considering, also, that during the life of Lord Orford, or so long as there should be any issue of his body, no person could legally come within the description of right heir of S. Rolle but Lord Orford and his issue, who were of the united line of Walpole and Rolle, and were all provided for by the estate tail
244* created by that indenture; considering, also, that it *appeared plainly by that deed that Lord Orford meant to provide for the separate line of Rolle; that no person of that separate line could come within the description of right heir of Samuel Rolle, till the united line should be exhausted; and that a limitation by way of remainder to heirs or children, is not necessarily confined to such persons as are within that description at the time the limitation is created; he was of opinion that the effect of the deed was to vest in Lord Orford an estate in tail general, with remainder (if he should make no appointment,) to such person as, at the expiration of that estate tail, should be right heir of Samuel Rolle in fee; and, consequently, that Mr. Trefusis, the right heir of S. Rolle, took an estate in fee under the deed. (*a*)

Upon a rehearing at the Rolls, Sir Thomas Plumer coincided in opinion with Mr. Justice Bailey. The case was afterwards heard in the House of Peers, but this point was not discussed. (*b*)

6. *The construction ought to be made on the entire deed*, and not merely on any particular part of it. *Ex antecedentibus et consequentibus fit optima interpretatio.*[1] Therefore every part of

(*a*) 2 Meriv. R. 178. (*b*) 2 Jacob & Walker's Rep. 1.

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[1] See Broom's Legal Maxims, p. 249; Hob. 275 a; 1 Shep. Touchst. 87, 88, by Preston; 1 Bulstr. 101. And it is added: — *Turpis est pars, quæ cum suo toto non convenit.* Plowd. 161; 23 Am. Jur. 271–274; 2 Smith's Lead. Cas. 295; 1 Poth. Obl. by Evans, p. 51, [96.] The rule of the Roman law is in the same spirit. *Plerumque ea quæ in præfationibus convenisse concipiuntur, etiam in stipulationibus repetita creduntur.* Dig. lib. 45, tit. 1, l. 134, § 1. See also Vattel, b. 2, ch. 17, § 285, 286, p. 321. And see the able judgment of Lord Eldon, in Browning *v.* Wright, 2 B. & P. 13. Where there is a grant by deed, in general terms, those terms may be limited and restrained by a recital, stating the object of the grant. Woods *v.* Nashua Man. Co., 5 N. Hamp. R. 467. See also Moore *v.* Griffin, 9 Shepl. 250; Jameson *v.* Balmer, 7 Shepl. 425. But as to the effect of recitals, and other parts of a deed, to control the operative words, the rule is stated to be this;—that when the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed; but when those words are of doubtful meaning, the recitals

a deed ought, if possible, to take effect, and every word to operate. (*a*)

7. *Verba posteriora propter certitudinem addita, ad priora, quæ certitudine indigent, sunt referenda.* And if certainty once appears in a deed, and afterwards in the same deed it is spoken indefinitely, reference shall be to the certainty which appears. (*b*) [1]

8. *Subsequent words shall not defeat precedent ones, if by construction they may stand together.* But where there are two clauses in a deed, of which the latter is contradictory to the former, there the former shall stand. (*c*) [2]

9. *Quando charta continet generalem clausulam, posteaque descendit ad verba specialia quæ clausulæ generali sunt consentanea, interpretanda est charta secundum verba specialia.* But it is also a maxim, that *generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa.* Therefore when a deed first contains special words, and afterwards concludes in general ones,[3]

(*a*) Het. 15. Carter, 98, 112. 1 P. Wms. 457. (2 Inst. 317. Jackson *v.* Blodget, 16 Johns. 172. Saunders *v.* Betts, 7 Wend. 287.)

(*b*) 4 Leon. 248.

(*c*) Hard. 94. 6 Mod. 107. (Mallorie's case, 5 Rep. 111. Lang *v.* Lee, 8 Rand. 410.)

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and other parts of the deed may be used as a test, to discover the intention of the parties, and to fix the true meaning of those words. Walsh *v.* Trevanion, 15 Ad. & El. 751, N. S., per Patteson, J. [See also Kaine *v.* Denniston, 22 Penn. (10 Harris,) 202.]

[1] See 8 Rep. 119, 138; Broom's Legal Maxims, 253; Hix *v.* Fleetwood, 4 Leon. 248. See also the observations of Mr. Justice Coleridge, in Rex *v.* Poor Com'rs St. Pancras, 6 A. & E. 7; Proctor *v.* Pool, 4 Dev. 370; Wing *v.* Burgis, 1 Shepl. 111; Crosby *v.* Bradbury, 2 Applet. 61.

[2] See *supra*, ch. 12, § 26, note, where this latter rule is explained. In the article before cited from the American Jurist, Vol. XXIII. p. 277, the rule is commented upon in the following terms:—"The old books say that if there be two clauses or parts of a deed repugnant the one to the other, the first part shall be received, and the latter rejected, unless there be some special reason to the contrary; but that in the case of a will containing two repugnant clauses or parts, the first shall be rejected, and the last received. 'The first deed and the last will shall operate,' is an ancient maxim. (Plowd. 541; Co. Lit. 112 b.; Shep. Touch. 88.) In modern times this maxim has very little operation. A 'reason to the contrary' is almost always found. The rules of construction now applied, in cases of repugnancy, give effect to the whole and every part of a will, deed, or other contract, when that is consistent with the rules of law and the intention of the party. And when this is impossible, the part which is repugnant to the general intention, or to an obvious particular intention, is wholly rejected. Parts, which were once regarded as repugnant, are now deemed consistent." And see 2 Smith's Leading Cases, p. 295.

[3] "In grants, &c., if words of restriction are added, which are repugnant to the grant, the restrictive words are rejected. As, if one grant all his lands, in the whole town of

both words, as well general as special, shall stand; for otherwise, the general words would have no effect. (*a*)

(*a*) Carth. 120.

A, viz. in the first parish; all the lands will pass, and the *scilicet* is void. Otherwise, if the grant be of lands in the town of A, namely, in the first parish. (Hob. 173.) So if there be a demise of lands and woods, (described,) except the woods, the exception is void. Or a lease for years to O. and his assigns, provided he shall not assign; the proviso is void. But if the *scilicet* or proviso be merely explanatory, and not repugnant to the grant, &c., the latter shall be limited by the explanatory clause. As in a feoffment of two acres, *habendum* the one in fee, and the other in tail, the *habendum* only explains the manner of taking, but does not restrain the gift. In these last, and similar examples, the substance of the premises is not altered. (See Hob. 172, 173; Mo. 880; Bac. Ab. *Grants*, I. 1; Jackson *v.* Ireland, 3 Wend. 99.) [A deed of a water-course contained in the granting part the words "to him and his heirs, executors, and assigns forever;" and there was a covenant that the grantee, "his executors, administrators, and assigns shall enjoy the premises forever, or so long as he may want the use of the water for machinery, and no longer." Held, that the covenant was not repugnant to the grant, but that if it were so, it should be rejected. Jewett *v.* Jewett, 16 Barb. Sup. Ct. 150.]

"Whatever is expressly granted, or covenanted, or promised, cannot be restrained or diminished by subsequent provisoes, restrictions, &c.; but general or doubtful clauses precedent may be distributed or explained by subsequent words and clauses not repugnant or contradictory to the express grant, covenant or promise. (See Cutler *v.* Tufts, 3 Pick. 272.) Nor can subsequent words or clauses, repugnant to the express grant, demise, covenant, &c., enlarge such grant, &c. Thus, where in a lease of land for forty years, the lessor covenanted that the lessee and his assigns should enjoy the land for the term of 'eighty years aforesaid,' it was decided that this covenant for the enjoyment did not enlarge the term; and the words 'eighty years aforesaid,' were rejected as inconsistent with the demise. (Savile, 71, pl. 147. See Weak *v.* Escott, 9 Price, 595.) So where a rent of £20 was granted, issuing out of certain lands, *habendum* after the decease of Ann Greaves and Thomas Greaves, or either of them,—the first payment to be made at a certain feast day that should first happen after the death of A. or T. Greaves,—with a clause that if the rent should be unpaid at any feast day named, the grantee, at any time during the joint lives of said A. and T. Greaves, might distrain, &c., as no rent was granted during the joint lives of these persons, the words "during the joint lives," &c., were rejected as repugnant. (Crowley *v.* Swindles, Vaugh. 173.) This case was decided on a demurrer to a cognizance in replevin, in which the grant was pleaded according to its meaning and effect, without mentioning the joint lives, &c. The plaintiff had oyer, and set forth the grant *in hæc verba*, and demurred. The cognizance was held good. The construction would have been the same if the grantee had claimed the rent while A. and T. Greaves were both alive.) So where A acknowledged the receipt of three hogsheads of tobacco in part of his claim on B, 'he the said A' to be allowed per cent. the highest six months' credit price, it was held that the words 'said A,' should be rejected as repugnant to the clear intent of the parties. (Ferguson *v.* Harwood, 7 Cranch, 414. This case was also decided on a question of variance,—the pleadings alleging the contract as above stated, and the contract itself being different. But Story, J., said that if the contract had been as set forth, the same result must have been produced. The cases of Vernon *v.* Alsop, T. Ray. 68, 1 Lev.

10. *Mala grammatica non vitiat chartam;* so that neither bad Latin nor bad English will make a deed void. (*a*) [1]

11. *The law will construe that part of a deed to precede* *which ought to precede;*[2] as if a person makes a lease, *245 reserving rent, *habendum* for twenty years, so that the reservation is placed before the *habendum*, yet it is good. And the Judges by their construction are so to marshal the words, as to make it a reservation of rent for the whole term. (*b*)

12. It is a maxim of law, that "*idem*" *semper refertur proximo antecedenti.*[3] Therefore if a man gives lands to A in tail, remain-

(*a*) 6 Rep. 38 b. 1 Ld. Raym. 335.
(*b*) 10 Rep. 28 a. Attoe *v.* Hemmings, 2 Bulst. 282.

77, 1 Sid. 105, and Mills *v.* Wright, 1 Freem. 247, come within this rule of construction,—where the condition of a bond for payment of money was, that the bond should be void if the money was *not* paid. It was wholly repugnant to the bond itself; but by rejection the bond was left in full force, as an entire and perfect contract. See Finch's Law, 52; Stockton *v.* Turner, 7 J. J. Marsh. 192; Gully *v.* Gully, 1 Hawks, 20; 1 Doug. 484, per Buller, J.; 2 Atk. 32.) So in all cases, doubtless, of the erroneous substitution of one party for the other, in a written contract, where the error is manifest on inspection of the instrument. This rejection of repugnant matter can, however, be made only in cases where there is a full and intelligible contract left to operate after the repugnant matter is excluded. Otherwise the whole contract, or such parts of it as are defective, will be pronounced void for uncertainty." 23 Am. Jur. 278–280. The rule governing the construction of general words,—*Verba generalia restringantur ad habilitatem rei vel personæ,*—is expounded by Lord Bacon, Max. p. 48, Reg. 10. And see Broom's Legal Maxims, p. 275.

[1] In this, as in several of the preceding and subsequent cases, the meaning of the parties, when otherwise apparent, controls some of the particular words. See Broom's Legal Maxims, p. 299; 2 Smith's Leading Cases, 317, 318; 1 Shep. Touchst. 87, by Preston. In the Roman Law, too,—*Si Librarius, in transcribendis stipulationis verbis, errasset, nihil nocet.* Dig. lib. 50, tit. 17, l. 92.

[2] See Cook *v.* Gerrard, 1 Saund. 181, by Williams, and the cases there cited, for examples of this rule. In some cases, the same words in a will may be taken, as to different estates, in different senses. Forth *v.* Chapman, 1 P. Wms. 663, 667. So, in a deed. Burton *v.* Barclay, 7 Bing. 745, 749. So, where one writing contains two distinct instruments; for example, a lease, and a release, the Court will read that part first, which ought to be regarded as first in point of time, in order to accomplish the intent of the parties. Barker *v.* Keat, 2 Mod. 249, 252; 1 Freem. 251; Bredon's case, 1 Rep. 76; 2 Smith's Leading Cases, 294. And see Hob. 171 a., cited *supra*, ch. 12, § 26, note.

[3] This is the general rule; but it is true only where the intent, upon the whole deed, does not appear to the contrary. "It is true," said Lord Abinger, "that in strict grammatical construction, the relative ought to apply to the last antecedent; but there are numerous examples in the best writers to show that the context may often require a deviation from this rule, and that the relative may be connected with nouns which go

der to B in *eâdem formâ*, B will take an estate tail. But if an estate be limited to A for life, remainder to B in tail, remainder to C *in formâ prædicta*, it is void for uncertainty. (*a*)

13. A deed is always construed most strongly against the grantor; *verba chartarum fortius accipiuntur contra proferentem, et quælibet concessio fortissime contra donatorem interpretanda est.*[1]

(*a*) 1 Inst. 20 b.

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before the last antecedent, and either take from it or give to it some qualification." And he proceeded to illustrate this by examples from statutes. Staniland *v.* Hopkins, 9 M. & W. 178, 192. And see Deriemer *v.* Fenna, 7 M. & W. 439; Broom's Legal Max. 292; Noy, Max. p. 4; Spyer *v.* Thelwall, 1 Tyr. & Gr. 191; 2 C. M. & R. 692.

[The lease of a wharf, after describing the boundaries, proceeded thus:—"Being the same premises now in the occupancy of A. B., together with all the rights, privileges, and appurtenances to said wharf, and to the flats belonging thereto, or in any ways appertaining," and which contains a covenant for quiet enjoyment, the words "being the same premises now in the occupancy of A. B.," apply only to the wharf, and have no reference to what follows. Davis *v.* Atkins, 9 Cush. 13.]

[1] This rule, like most others for the interpretation of contracts, is derived from the Roman Law, and is best expounded by the spirit of other maxims, such as these;—*Quoties idem sermo duas sententias exprimit, ea potissimum accipiatur quæ rei gerendæ aptior est.* Dig. lib. 50, tit. 17, l. 67. *Pactio obscura vel ambigua, venditori, et qui locavit, nocere placet, in quorum fuit potestate legem apertius conscribere.* Dig. lib. 2, tit. 14, l. 39. The same rule is expressed in other terms, by Labeo, in Dig. lib. 18, tit. 1, l. 21; and is cited and adopted by Vattel, b. 2, ch. 17, § 264, p. 311. And see 2 Smith's Leading Cas. 318; Shep. Law of Com. Assur. p. 265; 1 Shep. Touchst. 87, 88, by Preston; Broom's Legal Maxims, p. 254.

Lord Bacon, speaking of the rule of *fortius contra proferentem*, says, "It is to be noted, that this rule is *the last to be resorted to*, and is never to be relied upon but where all other rules of exposition of words fail; and if any other come in place, this giveth place. And that is a point worthy to be observed generally in the rules of the law, that when they encounter and cross one another in any case, it be understood which the law holdeth worthier, and to be preferred; and it is in this particular to consider, that this, being a rule of some strictness and rigor, doth not as it were its office, but in absence of other rules of more equity and humanity." Bac. Max. Reg. 3, p. 14. And it has been well observed, that this rule, at the present day, has but a very limited operation, and amounts in effect, to nothing more than this, that in a case of doubtful or ambiguous terms, the party promising shall be held to perform so much as to make the terms of his engagement operative, according to the spirit of those terms, *ut res magis valeat quam pereat.* See 24 Am. Jur. 11–13; Adams *v.* Frothingham, 3 Mass. 361; Worthington *v.* Hylyer, 4 Mass. 205; Cocheco Co. *v.* Whittier, 10 N. Hamp. 305. It is to be noted that the rule applies only to expressions which are in themselves *ambiguous.* Cum quæritur in stipulatione, quid acti sit, *ambiguitas* contra stipulatorem est. Dig. lib. 34, tit. 5, l. 26. Lord Coke qualifies the rule to the same effect, by adding to the maxim, quoted in the text, that it is so to be understood that no wrong be thereby done; for, he observes, it is another maxim in law, *Quòd legis constructio non facit injuriam.* 1 Inst. 183 a. And see Jackson *v.* Hudson, 3 Johns. 375, 387; Jackson *v.* Gardiner, 8 Johns. 406; Hall *v.* Gittings, 2 H. & J. 212; Watson *v.* Boylston, 5 Mass. 411;

For the principle of self-interest will make men sufficiently careful not to prejudice themselves, by using words of too extensive a meaning. And all manner of deceit is hereby avoided in deeds; for people would always affect ambiguous expressions, if they were afterwards at liberty to put their own construction on them. (*a*)

14. Thus, if lands be let in the premises of a deed, or a rent granted generally; an estate for life will pass. So, if a man makes a lease (to A,) for the life of B, and afterwards releases to A all his right in the land, A will take an estate for his own life; because that is higher than an estate for the life of another. (*b*)

15. *Where general words stand alone, in a release, unqualified by any recitals, they shall be construed most strongly against the*

(*a*) 1 Inst. 183 a. (2 Bl. Comm. 380.) (*b*) 1 Inst. 42 a, 183 a, 273 b.

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1 Poth. Obl. [97] note *a*, by Evans; 2 Kent, Comm. 556. [The rule that a deed is to be interpreted most strongly against the grantor, applies, not to assignments, but only to contracts. When it was transferred from the Roman law to ours, the reason of it was left behind, and this has seriously affected its value. That reason interpreted obscurities and ambiguities against the party who defined or wrote down the terms, because the fault was his. "*In stipulationibus, verba contra stipulatorem interpretanda sunt.*" In the Roman law the stipulator proposed the terms, and they were simply accepted by the promisor. Hogg's Appeal, 22 Penn. (10 Harris,) 479.

A grant is to be construed favorably for the grantee, and it shall carry with it, as far as the grantor has the power to grant, the rights *necessarily incident* to its enjoyment, but such construction is not to carry it beyond the terms of the grant. Estes *v.* Wells, 9 Cush. 489.

Where A conveyed to B by a deed of release, twelve house lots, "with the reserve of two streets contemplated by a plan made by C," it was held that the soil of the contemplated streets passed by the conveyance. Palmer *v.* Dougherty, 38 Maine, 502. And where a square of land, bounded by the sea, was conveyed, "reserving a street through the square, &c., together with the flats; namely, all my right to the same in front of said square to the channel," it was held that the flats passed by the deed. Winslow *v.* Patten, 34 Ib. 25. If a deed should bound the granted premises "on the sea," it would include the flats appurtenant; if it should bound the premises "on the flats," it would exclude the flats. The deed did bound the premises "on the sea or flats," and it was held that the flats were included, as this construction was most favorable to the grantee, and most strong against the grantor. Saltonstall *v.* Long Wharf, 7 Cush. 200. See, also, Dall *v.* Brown, 5 Ib. 289; Thayer *v.* Payne, 2 Ib. 327.]

But in the case of a grant by the sovereign or government, this rule of construction is reversed, and the grant is taken most beneficially for the grantor; for, it is made by a trustee for the public, and no alienation ought to be presumed that is not clearly expressed. Jackson *v.* Reeves, 3 Caines, 293, 296; Hagan *v.* Campbell, 8 Port. 9; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 546; Jackson *v.* Lamphire, 3 Pet. 289; Beatys *v.* Knowler, 4 Pet. 168; Providence Bank *v.* Billings, Ibid. 514; United States *v.* Arredondo, 6 Pet. 738. And see the cases cited *arguendo*, 11 Pet. 465, 466,

releasor.[1] But where there is a particular recital in a deed, and general words of release are afterwards inserted, the generality of the words shall be qualified by the recital. (*a*)

16. A release was executed in pursuance of an award; in which a release of all demands was inserted. It was contended, that the words were sufficient to release a growing rent; but it was determined, that they should not have so extensive an effect, because they were qualified by a particular recital. (*b*)

17. A *distinction* must however be made, in cases of this kind, *between an indenture and a deed poll.* For the words of an indenture executed by both parties, are to be considered as the words of both: but in a deed poll, they are the words of the grantor, and shall be taken most strongly against him. (*c*)[2]

18. *If the words of a deed will bear two different*
246* *senses, the* one conformable to law, and the other against it; that sense shall be preferred which is conformable to law;* for it is also a maxim, *quod legis constructio non facit injuriam.*[3] Thus if a tenant in tail creates an estate for life gen-

(*a*) (Thorpe *v.* Thorpe, 1 Ld. Raym. 235.)
(*b*) Henn *v.* Hanson, 1 Sid. 141. Thorpe *v.* Thorpe, 1 Ld. Raym. 235. 2 J. & W. 100.
(*c*) 1 Leon, 246. Owen, 251. 8 Mod. 312.

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(4); Mills *v.* St. Clair Co. 8 How. S. C. R. 569; Broom's Legal Maxims, 259, 260; Rex *v.* Mayor, &c., Lond. 1 C. M. & R. 12, 15, *arg.* and cases there cited; Chitty on Prerog. 391.

[1] This maxim should be taken in connection with another:—*Verba generalia restringantur ad habilitatem rei, vel personæ.* Bac. Max. Reg. 10, p. 43; Broom's Leg. Max. p. 275. And Pothier observes, that, "However general the terms may be in which an agreement is conceived, it only comprises those things, respecting which it appears that the contracting parties proposed to contract, and not others which they never thought of." 1 Poth. Obl. by Evans, p. [98,] Rule 8, cites Dig. lib. 2, tit. 15, l. 9, § 3. See 23 Am. Jur. 264-266; Cowp. 12, per Lord Mansfield; Lyman *v.* Clarke, 9 Mass. 235; Munro *v.* Allaire, 2 Caines, 329, confirmed in Willes *v.* Ferris, 5 Johns. 335, 345; *Infra*, ch. 21, § 62; [Derby *v.* Hall, 2 Gray, 247.]

[A similar rule is applied to the construction of statutes. "When statutes are made, there are some things which are exempted or foreprized out of the provisions thereof, though not expressly mentioned." Plowd. 13 b. When general terms are used, and the statute enumerates the particulars under a *videlicet*, it shows the intention of the legislature to limit the comprehensiveness of the general phraseology, to the particulars enumerated, and those *ejusdem generis.* United States *v.* Wise, 14 Law Rep. 264, (Number for September, 1851); S. C. 2 Wallace, Jr., 72.]

[2] Whether this distinction between an indenture and a deed poll in the method of interpretation, ought now to be relied on as a cardinal point, may perhaps be doubted. See 24 Am. Jur. p. 11, 12; 1 Poth. Obl. [97] note *a*, by Evans; Browning *v.* Wright, 2 Bos. & Pul. 22; Plowd. 140, *arg.*; Vattel, b. 2, ch. 17, § 267–271; *supra*, § 13, note.

[3] See Broom's Legal Maxims, p. 53, 259; Vattel, b. 2, ch. 17, § 282, 293, p. 319,

erally, it shall be only for the life of the tenant in tail: for otherwise it would operate as a wrong. (*a*)

19. The word "*and*" is sometimes construed in a disjunctive sense, in order to support the intention of the parties.[1]

20. A person leased lands for twenty-one years, and covenanted with the lessee to make to him *and* his assigns a lease for twenty-one years, to commence after the end of the first term. The lessee died, and his executor brought an action of covenant for a second lease. The Court held that the word *and* should be construed *or*, in the disjunctive; therefore that the lessor was bound to make a new lease to the executor of the lessee, as being his assignee in law. (*b*)

21. *Ancient charters are to be taken according to ancient usage;* for there are many old grants generally and insufficiently made, so that at this day they would be void. But being made before time of memory, and having been used since, they are good; and many liberties and franchises used thereby are likewise good. (*c*) [2]

22. It was held in the case of Davis *v.* Speed, that no estate will arise by implication in a deed: though *in conveyances deriving their operation from the Statute of Uses*, a *use may arise to the owner of the estate by implication;* to which the statute will transfer the legal estate. (*d*)

23. In some cases deeds have been construed according to the manner in which the parties themselves appeared to have understood them. But this doctrine has been lately denied: and it

(*a*) 1 Inst. 42 a, 183 a and b.
(*b*) Chapman *v.* Dalton, Plowd. 289. 1 Inst. 225 a.
(*c*) Bro. Ab. tit. Grants, 89. 2 Bulst. 298.
(*d*) 4 Mod. 156.

326; 2 Bl. Comm. 380; 1 Shep. Touchst. 88, by Preston. To the like effect is the rule of the Roman Law,— *Eligendum est quod minimum habet iniquitatis.* Dig. lib. 50, tit. 17, l. 200.

[1] *Conjunctio nonnunquam pro disjunctione accipitur.* Dig. lib. 50, tit. 16, l. 21. See 1 Jarman on Wills, p. 441–459, and the cases cited in Mr. Justice Perkins's notes. White *v.* Crawford, 10 Mass. 183; *Post*, tit. 38, ch. 9, § 18–29.

[2] See 24 Am. Jur. 8; Livingston *v.* Ten Broeck, 16 Johns. 14; Jackson *v.* Wood, 13 Johns. 346; Adams *v.* Frothingham, 3 Mass. 360. Similar to this rule, in principle, is the rule, that *contemporanea expositio est optima et fortissima in lege.* 2 Inst. 11; Broom's Leg. Max. 300; Attor.-Gen. *v.* Parker, 3 Atk. 577, 578, per Lord Hardwicke; Codman *v.* Winslow, 10 Mass. 149, per Sewall, C. J.

has been laid down that *a legal instrument shall not be construed by the acts of the parties.* (*a*) [1]

24. Where the words of a deed are *so uncertain that the intention of the parties cannot be discovered, the deed will be void.*[2] Thus a gift to A or B, or to one of the children of J. L.,

(*a*) Cooke *v.* Booth, *infra*, c. 26, § 103.

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[1] In the case of Cooke *v.* Booth, Cowp. 819, there was a lease for three lives, with a covenant, that if, upon the falling in of either or any of the lives, the lessee or his heirs, &c., should be minded to surrender the old and take a new lease, thereby adding a new life to the then two in being, the lessor would grant a new lease, &c., under the same rents and covenants; and the question was whether this amounted to a covenant for perpetual renewal. It appeared, in a case out of Chancery, that there had been frequent successive renewals, from the year 1688 to 1749, in all of which the covenant for renewal had been repeated. And it was held, that the parties themselves, by their acts of renewal, had given the construction of the words, and therefore it was a covenant for perpetual renewal. Ld. Mansfield, C. J., and Ashhurst, J., proceeded upon this ground alone; Buller, J., decided solely upon the authority of Bridges *v.* Hitchcock, 1 Bro. P. C. 522; and Willes, J., concurred upon both grounds.

Though the fact of the successive renewals was inserted in the case sent out of Chancery by Lord Bathurst, and therefore may have been regarded by the Judges in the King's Bench as intended by him to form a material element in their decision, without reference to the admissibility of the evidence, which was not a question before them; yet the case has generally been regarded, perhaps improperly, as establishing the broad proposition that the acts of the parties are to be received, in all cases, as exponents of the legal meaning of their covenants, even where the language is plain, and free from doubt. Viewed in this light, it has been, as Sir James Mansfield observed, "impeached on all occasions." 2 New Rep. 452; and see 6 Ves. 237; 9 Ves. 333; and it was overruled in Iggulden *v.* May, 7 East, 237, affirmed on Error in Cam. Scac. 2 New Rep. 449; but has been followed in Ireland, in Atkinson *v.* Pilworth, 1 Vern. & Scriv. 157, 161, and Boyle *v.* Lysaght, Ibid. 135.

But though "evidence of usage or possession is never to be received to overturn the *clear words* of a deed or other instrument of conveyance; and the acts and declarations of the parties are not admissible to show their understanding of the instrument;" 16 Pick. 239; yet it is equally true, and well settled, that where the language of a deed or contract is *equivocal* or *doubtful*, the uniform construction practically given to it by the parties, in their acts under the deed or contract, may be resorted to in aid of the exposition. This has often been done in cases of doubt as to the boundaries, or subject of the contract; but the principle has been also applied in other cases. See Livingston *v.* Ten Broeck, 16 Johns. 14, 23; Cortelyou *v.* Van Brundt, 2 Johns. 357, 362, per Thompson, J.; Choate *v.* Burnham, 7 Pick. 274; Allen *v.* Kingsbury, 16 Pick. 239; Cambridge *v.* Lexington, 17 Pick. 222; Stone *v.* Clarke, 1 Met. 378; 1 Greenl. Evid. § 293; 24 Am. Jur. 9, 10; Clark *v.* Wethey, 19 Wend. 320; Wheelock *v.* Moulton, 15 Verm. 519.

[2] A deed is void for uncertainty, only in those cases where the Court, placing itself in the situation of the party, whose deed it is, at the time of its execution, and with knowledge of the surrounding circumstances, and of the force and import of the words,

he having four children, is void for uncertainty. And it has been stated, that if an estate be limited to A for life, remainder to B in tail, remainder to C *in formâ prædictâ*, it is void for uncertainty. (*a*)

*25. Where there are *any words in a deed* that evidently *247 appear *repugnant to the other parts of it, and to the general intention of the parties*, they will be *rejected as insensible;* for the words are not the principal things in a deed, but the intent and design of the parties.[1]

26. Thus, it is stated in Brooke's Abr., that if a feoffment in

(*a*) 2 And. R. 103. *Ante*, s. 12.

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cannot ascertain his meaning and intention from the language of the instrument thus illustrated. 1 Greenl. on Evid. § 300, and cases there cited. And see 24 Am. Jur. 16; 1 Inst. 20 b; Doe *v.* Thomas, 6 T. R. 671; Doe *v.* Fleming, 5 Tyrw. 1013; 4 Mass. 205; United States *v.* King, 3 How. S. C. Rep. 773; [see Abbott *v.* Pike, 33 Maine, 204. A deed of land described as "ten acres of lot No. 70, in the second division of lots in D," is void for uncertainty. Bean *v.* Thompson, 19 N. H. 290.]

[1] But if both parts of the deed may well stand together, consistently with the rules of law, they shall be so construed as to have that effect, rather than be held repugnant. Corbin *v.* Healey, 20 Pick. 514; Shepard *v.* Simpson, 1 Dev. 237; [Jewett *v.* Jewett, 16 Barb. Sup. Ct. 150.]

There is a similar rule in the Roman Law:—*Quæ* [*in testamento*] *ita sunt scripta ut intelligi non possunt, perinde sunt, ac si scripta non essent.* Dig. lib. 50, tit. 17, l. 73, § 3. This rejection of repugnant matter can, however, be made only in cases where there is a full and intelligible contract left to operate, after the repugnant matter is excluded. Otherwise, the whole contract, or such parts of it as are defective, will be pronounced void for uncertainty. See 23 Am. Jur. 278–280, where this rule is clearly illustrated. The case of Worthington *v.* Hylyer, 4 Mass. 196, affords an example of the application of this rule, which deserves the particular attention of the student. In that case, one Ashley mortgaged to the plaintiff's testator, "all that my farm of land in Washington on which I now dwell, *being lot No.* 17,"—particularly describing this lot by certain boundaries,—"containing 100 acres, with my dwelling house and barn thereon standing." The farm in fact consisted of the lot No. 17 and *three other* contiguous lots of land, on one of which three last-mentioned lots the buildings stood. And it was held, that the mention of the lot No. 17, with its description, was to be rejected, as repugnant to the rest of the deed, and that the entire farm passed by the conveyance. The following cases are also illustrative of the application and limitations of this rule. Hull *v.* Foster, 7 Verm. 100; Lyman *v.* Loomis, 5 N. Hamp. 408; Jackson *v.* Clark, 7 Johns. 217; Ela *v.* Card, 2 N. Hamp. 175; Cutler *v.* Tufts, 3 Pick. 272; Bott *v.* Burnell, 11 Mass. 163; Porter *v.* Ingram, Harper, 492; Ingram *v.* Porter, 4 McCord, 198; Ferguson *v.* Harwood, 7 Cranch, 414. And see Lamb *v.* Reaston, 5 Taunt. 207; 1 Marsh. 25; Spyve *v.* Topham, 3 East, 115; Vernon *v.* Alsop, T. Raym. 68; Sims *v.* Doughty, 5 Ves. 243; Vose *v.* Bradstreet, 14 Shepl. 156; Jackson *v.* Root, 18 Johns. 60; *Infra*, ch. 21, § 31, note; Jackson *v.* Clark, 6 Cowen, 281; [Abbott *v.* Pike, 33 Maine, (3 Red.) 204; Evans *v.* Corley, 8 Rich. (S. C.) 315.]

fee be made to W. N. during the life of J. S. The words, "during the life of J. S.," would be rejected, because they were contrary to the fee. (*a*)

27. A rent of £20 was granted to B. and M., *habendum* to them after the decease of one C. and D. or either of them, during the lives of B. and M. and the longer liver of them, the first payment to begin after the decease of the said C. and D. or either of them. And if the said rent should be unpaid, that it should be lawful for the said B. and M., at any time during the joint natural lives of the said C. and D., to distrain. Here the power to distrain being given before the rent could be behind, it was held that the words, during the joint lives of the said C. and D., being insensible, ought to be rejected. (*b*)

28. In the case of Dormer *v.* Parkhurst, where lands were limited to A for ninety-nine years, if he should so long live; and from and after the death of A or other sooner determination of the estate limited to him for ninety-nine years, to the use of trustees and their heirs, during the life of A, to preserve contingent remainders; it was determined that the words "and from and after the death of A," should be rejected as insensible and repugnant to the subsequent words. (*c*)

29. *An evident omission or mistake will be supplied in a deed.*[1] Thus where the name of the bargainor was omitted in the operative part of a bargain and sale, it was supplied.

30. Lord Say and Sele conveyed his estate to B. K., for the purpose of making him tenant to the *præcipe* by a deed of bargain and sale, which was worded in the following manner:—"Witnesseth that for and in consideration of five shillings by the said B. K. to the said Lord S. in hand paid, as also for the cutting off of all entails, &c., and for settling and assuring the same to the said Lord S., and his heirs, doth bargain, sell and confirm unto the said B. K.," &c. The Court was of opinion that this deed passed the freehold; because such was the intention of it. (*d*)

(*a*) Tit. Estates, pl. 50. (*b*) Crowley *v.* Swindles, Vaugh. 173. (*c*) Tit. 16, c. 1, s. 43.
(*d*) Lloyd *v.* Say and Sele, 1 Salk. 341. 10 Mod. 40.

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[1] See Trethewy *v.* Ellesden, 2 Ventr. 141; Spyve *v.* Topham, 5 East, 115; Coles *v.* Hulme, 8 B. & C. 568; Holden *v.* Raphael, 4 Ad. & El. 228, and the cases there cited. [Huddleson *v.* Reynolds, 8 Gill. 382; Douglass *v.* Branch Bank, 19 Ala. 659.]

*Upon a writ of error in the House of Lords, it was contended, that this bargain and sale could not convey any *248 estate, because it was not mentioned therein that any person did bargain and sell. On the other side it was argued, that it appeared *primâ facie* that the consideration-money was paid by B. K. to Lord S., and that it was for barring all entails and remainders in the premises, and assuring the same to Lord S., and his heirs; that it appeared, as well by this deed as by the evidence on the trial, that the lands therein mentioned were the estate of Lord S.; and that the intent of the deed was to make B. K. tenant of the freehold, in order that a common recovery might be suffered. Therefore the Court of King's Bench was of opinion that the freehold was well conveyed by the deed. The judgment was affirmed. (*a*)

31. Where there is an evident *mistake in a marriage settlement*, the *Court of Chancery will rectify it.*

32. In a settlement, lands were limited to the husband for life, remainder as to part, to the wife for life, remainder of the whole to the first and other sons of the marriage successively in tail male, remainder to trustees for five hundred years, to raise portions for the younger sons and daughters; the trust of the term was declared to be to secure maintenance for the younger children from the husband's death, and to pay the portions of the younger sons at twenty-one, and of the daughters at twenty-one, or marriage. The eldest son suffered a recovery of the estate tail. A bill was brought to rectify the mistake in the settlement, in placing the term after the limitation to the first and other sons in tail; whereas the term should have come in before that limitation. Sir J. Jekyll decreed that the settlement should be rectified, by placing the term of five hundred years before the estate tail. (*b*)

33. Where a deed *cannot operate in the way intended* by the parties, it will be construed in such a manner as to *operate, if possible, in some other way; quando quod ago non valet ut ago, valeat quantum valere potest.*[1] And, in consequence of this prin-

(*a*) 4 Bro. Parl. Ca. 73. Cholmondeley *v.* Clinton, 2 Barn. & Ald. 625.
(*b*) Uvedale *v.* Halfpenny, 2 P. Wms. 151. Targus *v.* Pugit, 2 Vez. 194.

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[1] See Broom's Legal Maxims, p. 238–248; 23 Am. Jur. 263; 1 Shep. Touchst., by

ciple, it has been determined that a deed which was intended to operate as a lease and release, or bargain and sale, but could not take effect in that manner, should operate as a covenant to stand seised. (*a*)

249* *34. [Thus in Osman *v.* Sheafe, where one by deed granted land to another, who was *a relation* of the grantor, with a letter of attorney, to make livery, and *no livery was made*, the deed was held to operate as a *covenant to stand seised.* (*b*)

35. Again, in Crossing and Scudamore before stated, a deed enrolled, intended to operate as a *bargain and sale* from a father to his daughter, though *void for want of a pecuniary consideration*, was held *good as a covenant to stand seised.* (*c*)

36. It is stated to have been ruled by Lord Kenyon at the Stafford assize, that an instrument in the form of a *surrender*, might operate as a *covenant to stand seised.*] (*d*)

37. A deed intended to operate as a *bargain and sale*, but which was *void for want of a pecuniary consideration*, has been held to operate as a *confirmation.*

38. A father, by indenture, in *consideration of the love he bore his son, bargained, sold, gave, granted, and confirmed* certain lands to him and his heirs. The deed was enrolled; and the question was, whether the lands should pass. It was held, they should not, unless money had been paid, or estate were executed; for the use should not pass; but because the son was then in possession, it was held to enure by way of *confirmation.* (*e*)

39. So where a conveyance was *void as a lease and release*, because the releasor had only a term for years in the land, it was resolved that it should *operate as a grant and assignment.*

(*a*) Hob. 277. 6 East, 106. *Ante*, c. 10, s. 5.
(*b*) 8 Lev. 372. 1 P. Will. 168. 2 Saund. 96 a. n. (1.)
(*c*) Sup. 101, 106. 1 Vent. 137. Sty. 204. 2 Saund. 96 a, n. (1.)
(*d*) 3 Prest. Abst. 22.
(*e*) Osborn *v.* Churchman, Cro. Jac. 127.

Preston, p. 87; Goodtitle *v.* Bailey, Cowp. 697, 700; Roe *v.* Abp. of York, 6 East, 86, 105; King *v.* Melling, 1 Ventr. 214, 216; Roe *v.* Tranmarr, Willes, 682; Doe *v.* Adams, 2 Cr. & J. 232; Doe *v.* Woodroffe, 10 M. & W. 608; Law *v.* Hempstead, 10 Conn. 23; Conn *v.* Manifee, 2 A. K. Marsh. 396; 1 Story, Eq. Jur. § 168; Bryan *v.* Bradley, 16 Conn. 474; Thomas *v.* Hatch, 3 Sumn. 170; Moore *v.* Griffin, 9 Shep. 350; Cocheco Co. *v.* Whittier, 10 N. Hamp. 305; Means *v.* Presbyterian Cha. 3 Watts & Serg. 308; Barrett *v.* French, 1 Conn. 354; [Cobb *v.* Hines, Busbee, Law, (N. C.) 343.]

40. A person possessed of lands for *a term of* 999 *years*, by lease and release, for a valuable consideration, *granted, bargained, sold, and demised* them to trustees and their heirs, to the use of himself and his wife for their lives, remainder to the heirs of the wife; and covenanted that he was seised in fee. It was argued, that nothing passed by this conveyance; for it being only a term in gross, no use passed to the trustees by the statute 27 Hen. VIII. which only raises a use out of a freehold; that no use passed by the lease for a year, or bargain and sale, and therefore the release could not operate by way of enlargement. But the Chancellor was of opinion, that although the conveyance was void as a lease and release; yet, the husband being in possession, and the word "*grant*" being inserted in the release, it should take effect as a grant or assignment of his whole interest at common law. (*a*)

* 41. *A release* will be construed to *operate as a grant* *250 *of a reversion*, in order to effectuate the intention of the parties. (*b*)

42. Robert Edwards being entitled to a reversion in fee, expectant on an estate for life, by *deed of release renounced, remised, released, and forever quitclaimed*, all the said premises to A, and the heirs male of his body; and *all his right, title, and interest* therein. It was contended that nothing passed by the release in this case, for want of proper operative words. There were appropriated terms to every conveyance; and where the word *grant* was used, being *genus generalissimum*, if the instrument could not take effect according to its proper form, it should operate in some other, if by law it could. But here the words were, *renounce, release, and quitclaim;* which were the special form of words adapted to a release only; therefore it could not operate as a grant. 1 Inst. 301 *b*. "A release, confirmation, or surrender, &c. cannot amount to a grant." In the case of Roe *v.* Tranmer, (*c*) the word "*grant*" was used; and so it was in the cases there cited; but here, there was no such word, nor any thing equivalent to it; consequently, nothing passed by the deed. Lord Mansfield said, the rules laid down in respect of the construction of deeds, were founded in law, reason, and com-

(*a*) Marshall *v.* Frank, Gilb. R. 143. Doe *v.* Williams, *infra*. (*b*) *Ante*, c. 4, s. 39.
(*c*) *Ante*, c. 10, s. 4. See also tit. 16, c. 5, § 24.

mon sense; that they should operate according to the intention of the parties, if by law they might; and if they could not operate in one form, they should operate in that which by law would effectuate the intention. But an objection was made in this case, which, it was said, took it out of the general rule, and the doctrine of the authority cited; that was, that in the release in question, the word "*grant*" was not made use of. But that the intention of the parties was to pass all the right and title of the plaintiff in the premises, was manifest beyond a doubt. (*a*)

Mr. Justice Aston observed, that this was the common wording of a release; but though in the shape of a release, if there were sufficient words, it might operate as a grant. (*b*)

Judgment was given upon another point.

43. [In Spyve *v.* Topham, a deed, intended as a release, could not so operate, because the lease for a year was made to Bass, the trustee, and the release by mistake was made to Topham, the purchaser, (instead of Bass,) and his heirs, to the usual uses, to bar dower: the Court of King's Bench held that the deed was good as a grant. (*c*)

251 * *44. Again, in Haggerston *v.* Hanbury, a tenant in tail, in order to make a tenant to the *præcipe*, by indenture duly enrolled, *granted, bargained, and sold* the entailed estate to A and B *to the use* of A, who was made the tenant to the *præcipe* in the recovery. It was objected to the recovery, that the tenant to the *præcipe* had not the legal estate in the entirety, the use to him being inoperative at law. This objection was considered fatal to the operation of the deed as a bargain and sale; but there being an outstanding term, the Court of King's Bench certified that the bargain and sale, though enrolled, operated as a good *grant* of the reversion, and passed the freehold of the entirety to the tenant to the *præcipe*, and that consequently the recovery was good. (*d*)

45. So also in Doe *v.* Cole, where one *leased, granted, assigned, limited, and appointed* lands to A for life, and no livery of seisin was made, the lands being in the possession of a tenant from year to year, the Court of King's Bench decided that the deed was good as a grant of the reversion. (*e*)

(*a*) Goodtitle *v.* Bailey, Cowp. 597.
(*b*) *Vide* Chester *v.* Willan; Eustace *v.* Scawen, tit. 18, c. 2, § 27, 28.
(*c*) 3 East, R. 115. (*d*) 5 Bar. & Cress. 101. (*e*) 7 B. & C. 243.

46. In Shove *v.* Pincke, the words "*limit and appoint,*" in a deed, were held to operate by way of grant of the inheritance subject to a term of years.] (*a*)

47. Where a deed of *bargain and sale* is *not enrolled*, relief may notwithstanding be had *in equity* upon it, as *an agreement to convey;* an obligation arising upon it from the payment of the money. It may also, as before noticed, be good as a grant of the reversion, if the lands are in the occupation of tenants. (*b*)

48. All modern deeds contain, in the granting part, a great number of the most operative technical words. Thus, in a release, the words "*grant, bargain, sell, release, and confirm,*" are always used; because, if the conveyance should not happen to be good as a release, it may operate as a grant, a bargain and sale, or a confirmation.

49. *Where a deed may enure in different ways*, the person to whom it is made shall have his *election which way to take it.* Thus, if a deed be made by the words "*dedi et concessi,*" this in law may amount to a grant, feoffment, gift, lease, release, confirmation, or surrender. And it is in the choice of the grantee to plead or use it in any of these ways. (*c*)

50. Sir R. Heyward, being seised in fee, of the manor of D., &c., and of divers lands and tenements, whereof part was in *demesne, part in lease for years, with rents reserved, *252 and part in copyhold; by indenture, in consideration of a sum of money paid to him by R. W. and E. P., demised, granted, bargained, and sold, to the said R. W. &c., the said manors, lands, tenements, and the reversions and remainders of them, with all rents reserved on any demise; to hold to them and their assigns, presently after the decease of the said R. Heyward, for the term of seventeen years; which indenture was enrolled. Afterwards the said Sir R. H., by another indenture, covenanted with T. F. and others, to stand seised of the premises to the use of himself and the heirs of his body; and no attornment was made under the first conveyance. The question was, whether the bargainees should have election to take by the bargain and sale *in toto*, notwithstanding their general entry; or whether the estate, which passed as an interest at common law, should be preferred before

(*a*) 5 T. R. 124. *Supra*, c. 4, s. 37. (*b*) 11 Ves. 625. *Ante*, c. 4, s. 39, *et supra*, s. 45.
(*c*) (Jackson *v.* Hudson, 3 Johns. 375.)

the raising a use. It was resolved by Popham and Anderson, Chief Justices, and the whole Court of Wards, that R. W. and E. P. had election to take it, either by demise at the common law, or by bargain and sale; for where a person seised in fee, for money, demises, grants, bargains, and sells his lands for years, he who is owner of the land, by his express grant, gives election to the lessee to take it by the one way or the other; for he hath sole power to pass it by demise or bargain; and therefore the law will not make construction against such express grant; and namely, in this case, where it would tend to the prejudice of the lessees; for if the law should force them to take it by demise, then they would lose the rents reserved upon the leases for years. It was also resolved, that this right of election continued, notwithstanding the alteration of the estate by the second indenture, the death of the lessor, and the Queen's right to the wardship of the heir. And that where an estate passes, and the donee or grantee has a right of election, such right descends to his heirs or executors. (*a*)

51. A lease was made to A for twenty years, rendering rent. A entered; afterwards the lessor, for money paid by B, demised, granted, and to farm let to B the same land for four years from the date of the said indenture; and afterwards enfeoffed by deed the second lessee, before he had elected to take the lease by way of bargain and sale, or otherwise, and before any rent paid to him; and neither upon the deed of feoffment, 253* *nor after, did he declare what way he took the lease; nor had he any attornment from the first lessee; and therefore Jones, Justice, was of opinion that B had election to take it by demise at common law, or by way of bargain and sale, executed by the stat. 27 Hen. VIII., according to Heyward's and Fox's case; but till election, he should take it as a lease at common law; and if there was no attornment, it was as a future interest; but if he had received the rent of the first lessee, this had been an election in law to take it by way of bargain and sale. (*b*)

52. It is laid down by Jenkins, Cent. 4, Ca. 20, that *against a consideration* alleged in a deed, or *a use declared, no averment*

(*a*) Heyward's case, 2 Rep. 35. 1 Inst. 145 a.

(*b*) Darrell *v.* Gunter, W. Jones, 206. 2 Roll. Ab. 787, pl. 7. (*Supra*, § 50, and ch. 9, § 8.)

to the contrary can be received. So of indentures upon fines and recoveries, where the fines and recoveries pursue them. *Nihil est tam naturale quam quodlibet dissolvi, eo modo quo ligatur:* Contract by contract, deed by deed, record by record, parliament by parliament.[1] And since the Statute of Frauds, by which all contracts for lands must be in writing, no averment founded on parol evidence, which tends to contradict or vary a written agreement, is *in general* admissible.

53. Upon a motion for a new trial, the facts were, that an agreement in writing was entered into, by which it was stipulated that the grass and vesture of hay, of a close called Boreham Meadow, was to be taken by one Ansell. The subscribing witness to the agreement deposed, that when the written agreement was made, it was also agreed by the parties by parol, that Ansell should not only have the hay of Boreham Meadow, but also the whole possession and soil thereof, and of another close called Milcroft. Lord Mansfield admitted this evidence; but the Court

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[1] The American Courts recognize a distinction, in averments against the consideration recited in a deed between an averment for the purpose of defeating the operation and effect of the conveyance itself, as, by showing that it was for a consideration essentially different from that which is recited; and an averment for the mere purpose of showing that the money is still due to the vendor. The former, as going to subvert the entire transaction, as well as to violate the established rules of evidence, is not permitted. But the recital of the *amount* of the money paid, being a matter not of the essence of the conveyance, but collateral, and not likely, therefore, to have received much attention from the parties, is regarded like other recitals of quantity and value, and is not permitted to estop the vendor, in a suit to recover the purchase-money. See 1 Greenl. Evid. § 26, note, and the cases there cited; *Supra*, ch. 2, § 38, note. See also Lazell *v.* Lazell, 12 Verm. 443; Grout *v.* Townsend, 2 Hill, 554; Byers *v.* Mullen, 9 Watts, 266; Hamilton *v.* McGuire, 3 S. & R. 355; O'Neale *v.* Lodge, 3 H. & McH. 433. [Ayers *v.* McConnell, 15 Ill. 230; Hedley *v.* Briggs, 2 R. I. 489; Spaulding *v.* Brent, 3 Md. Ch. Decis. 411; In re Young's estate, Ib. 461; Logan *v.* Bond, 13 Geo. 192; Murphy *v.* Branch Bank, 16 Ala. 90; Davidson *v.* Jones, 26 Miss. (4 Cushm.) 56.]

The distinction, thus admitted and applied, does in no manner contravene the maxim cited in the text; which is borrowed from the Roman Law, and is best expounded by its own context, and in connection with others of the like import. *Nihil tam naturale est, quam eo genere quidque dissolvere, quo colligatum est; ideo verborum obligatio verbis tollitur; nudi consensus obligatio contrario consensu dissolvitur.* Dig. lib. 50, tit. 17, b. 35. *Omnia quæ jure contrahuntur, contrario jure pereunt.* Dig. lib. 50, tit. 17, l. 100. *Ferè, quibuscunque modis obligamur, iisdem in contrarium actis liberamur: cum quibus modis adquirimus, iisdem in contrarium actis amittimus. Ut, igitur, nulla possessio adquiri, nisi animo et corpore, potest; ita nulla amittitur, nisi in qua utrumque in contrarium actum.* Dig. lib. 50, tit. 17, l. 153. See Broom's Legal Maxims, p. 407, for illustrations of these rules.

of Common Pleas said—" We are all clearly of opinion, that no parol evidence is admissible to disannul, and substantially to vary, a written agreement. The parol evidence in the present case totally annuls, and substantially alters and impugns, the written agreement." (*a*)

54. An action on the case was brought for the use and occupation of a house, of which, it was agreed in writing, that a lease should be let by Christiana Preston to Abraham Gamage, for 21 years, at £26 per annum. Gamage died, and made Merceau his executor, who paid into Court £26 for one year's rent. On the trial, the plaintiff offered to show by parol evidence, that besides the £26 per annum, the defendant had agreed to pay
254* * £2 12*s.* 6*d.* a year, being the ground rent of the premises, to the ground landlord; but no evidence was offered of the actual payment of such ground rent during the testator's life; without which, Ld. Ch. Just. de Grey thought such parol evidence inadmissible, and nonsuited the plaintiff. Upon a motion to set aside the nonsuit, Mr. Justice Blackstone declared his opinion that it was right to reject this evidence. The Courts should be very cautious in admitting any evidence to supply or explain written agreements, else the Statute of Frauds would be eluded, and the same uncertainty introduced, by suppletory or explanatory evidence, which that statute had suppressed in respect to the principal object. It never ought to be suffered so as to contradict or explain away an explicit agreement; for that was in effect to vary it. Here was a positive agreement, that the tenant should pay £26. Should the Court admit proof that this meant £28 2*s.* 6*d.*? What was it to the tenant to whom the rent was to be paid, so as he was obliged to pay more than his contract expressed. The Court could neither alter the rent, nor the term. (*b*)

55. The same doctrine is established in equity; for Lord Hardwicke has said, that to add any thing to an agreement in writing, by admitting parol evidence, which would affect land, was not only contrary to the Statute of Frauds, but to the rule of the common law, before that statute was in being; and it has been laid down by the Court of Exchequer, that where there is an agreement in writing executed, no evidence can be given to

(*a*) Meres *v.* Ansell, 3 Wils. R. 275. (*b*) Preston *v.* Merceau, 2 Black. R. 1249.

supply any defect in it, which was intended to be part of it, but not inserted; for that would be to evade the Statute of Frauds, and introduce more perjury. (*a*)

56. There are, however, some cases in which *averments* founded on parol evidence *of collateral facts, tending to support or explain a deed,* have been *admitted.* Thus in the case of a bargain and sale to uses, an averment, that a pecuniary consideration was given, might have been made before the Statute of Frauds, and is still allowed; because such an averment stands with the deed. (*b*)[1]

57. In the case of Preston *v.* Merceau, Sir W. Blackstone observed, that with respect to collateral matters, parol evidence might be admissible: the plaintiff might show who was to put the house in repair, or the like, concerning which nothing was said; but he could not by parol evidence shorten the term to * fourteen, or extend it to twenty-five years; or make * 255 the rent other than £26 a year. (*c*)

58. In a modern case, the consideration expressed in a deed of conveyance was £28, but parol evidence was admitted to prove that £30 was the real consideration; and Lord Kenyon said, it was clear that the party might prove other considerations than those expressed in the deed; it was permitted in all cases of covenants to stand seised to uses. (*d*)

59. In a subsequent case, parol evidence was received, to prove that a sum of money was paid as an apprentice fee; though no mention of that circumstance was made in the contract of apprenticeship: and Lord Kenyon observed, that this parol evidence was not offered to contradict the written agreement, but to ascertain an independent fact, and therefore it was properly received in evidence. (*e*)

60. In the case of an *ambiguitas patens*, that is, *an ambiguity which appears upon the face of the instrument,* no averment is

(*a*) 2 Atk. 384. Treat. of Eq. B. 1, c. 8, s. 11. Tinney *v.* Tinney, tit. 7, c. 1, s. 19. Binstead *v.* Colman, Bunb. 65.

(*b*) 5 Rep. 68 b. *Ante*, c. 9, s. 20. 1 Rep. 176 a. 2 Roll. Ab. 786. Bedell's case, *ante*, c. 10, § 16. (*Supra*, § 52, note.)

(*c*) *Ante*, s. 54.

(*d*) The King *v.* Scammondem, 4 Term R. 474. (*Supra*, ch. 2, § 38, note.)

(*e*) The King *v.* Laindon, 8 Term R. 379.

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[1] See *supra*, ch. 2, § 38, note. 1 Greenl. on Evid. § 285.

allowed to explain it; but in the case of an *ambiguitas latens*, an averment to explain it, supported by parol evidence, is admissible. Hence Lord Bacon's maxim, No. 23. *Ambiguitas verborum latens, verificatione suppletur: nam quod ex facto oritur ambiguum, verificatione facti tollitur.*[1] Thus if a feoffment be made of the manor of S. and the feoffor has a manor called North S., and another called South S., parol evidence will be admitted to show which manor was meant. (*a*)

61. This doctrine is not altered by the Statute of Frauds; it being now held that parol evidence is admissible in all cases of latent ambiguities. And in the case of Meres *v.* Ansell, the Court of Common Pleas said, that in some cases of deeds, where there were two Johns named, or two black acres mentioned, parol evidence might be admitted to explain which John, or which black acre was meant. (*b*)

62. In a modern case, Lord Thurlow said:—"If there be a latent ambiguity, it must be explained by parol evidence: for though the words do not *primâ facie* import an ambiguity, yet if such ambiguity can be made to appear from parol evidence, it must be admitted to explain it, as well as to raise it; but if words have in themselves a positive precise sense, I have no

(*a*) Harding *v.* Suffolk, 1 Rep. in Cha. 74.
(*b*) *Ante*, s. 58.

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[1] On the subject of ambiguities, and the admissibility of parol evidence to explain them, see 1 Greenl. on Evid. § 297–300. See also Vice-Chancellor Wigram's Treatise on the Interpretation of Wills, § 196–210, p. 170–182. [Atkinson *v.* Cummins, 9 How. U. S. 479; White *v.* Bliss, 8 Cush. 512; Peaslee *v.* Gee, 19 N. H. 273; Camley *v.* Stamfield, 10 Texas, 546; Breeding *v.* Taylor, 13 B. Monr. 477.

Cedar Cabin was the name by which a tract of land was known to the parties to the deed. On this tract was a cedar cabin of trifling value. The grantor "resigned all his right, title and interest to the Cedar Cabin," for the sum of $400; held that this passed all his interest in the Cedar Cabin tract of land. Cravens *v.* Pettit, 16 Mis. (1 Bennett.) 210. An agreement in writing to lease for a term of years "the Adams House, situate on Washington street, in Boston," may be proved by parol to have been intended by the parties to include only so much of the building as was fitted up as a hotel by the name of the "Adams House," and not the separate shops which occupied the whole of the ground floor except the entrance to the hotel, it being a case of latent ambiguity. Sargent *v.* Adams, 3 Gray, 72. So an agreement in writing to convey "the wharf and flats occupied by G., and owned by H., may be applied to the subject-matter by parol evidence. Gerrish *v.* Towne, Ib. 82. And where there are two or more monuments, either of which may be that designated in a deed, the one intended may be shown by parol. Clough *v.* Bowman, 15 N. H. 504.]

idea of its being possible to change them; and I take it to be an established rule that words cannot be changed in that manner. (*a*)

*63. Where it is alleged, in a *court of equity*, that a *256 *material part of a deed has been omitted by fraud;* or, that the intention of the parties has been *mistaken and misapprehended by the drawer of the deed;* parol evidence will be admitted to prove such fraud or mistake. (*b*) [1]

64. It is a rule of law that *a person shall always be estopped by his own deed;* that is, he shall not be allowed to aver any thing in contradiction to what he has once so solemnly and deliberately avowed.[2] Thus, if a person makes a lease for years,

(*a*) 1 Bro. C. C. 388. Beaumont *v.* Field, 1 Barn. & Ald. 247.
(*b*) Treat. of Eq. B. 1, ch. 3, s. 11.

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[1] See *infra*, ch. 21, § 31, note, as to the mode of correcting mistakes in deeds. See, also, 1 Story on Eq. Jur. § 152–169, where the subject is fully treated.

[2] On the Doctrine of Estoppel, with reference to the transfer of Contingent and Executory Interests, the student may profitably read an essay in the (London) Law Magazine, Vol. I. p. 76–82. The Law of Estoppel, "now almost reduced to consonancy with the rules of common sense and justice," is treated with great discrimination and clearness of method, in the notes of Mr. Smith, and of Mr. Hare to several cases on that subject, ending with Trevivan *v.* Lawrance, 1 Salk. 276, in 2 Smith's Leading Cases, p. 436 *et seq.*, to which the student is also referred. And see the judgment of Mr. Justice Story, in Carver *v.* Jackson, 4 Pet. 83–88; 1 Greenl. on Evid. § 23; 4 Kent, Comm. 98, 99, 260, 448. [See, also, Augusta Bank *v.* Hamblet, 35 Maine, (5 Red.) 491; Jarvis *v.* Aikens, 25 Vt. (2 Deane,) 635; Tufts *v.* Charlestown, 2 Gray, 271; Brown *v.* Manter, 1 Foster, (N. H.) 528; Wedge *v.* Moore, 6 Cush. 8; Cross *v.* Robinson, 21 Conn. 379; Blair *v.* Smith, 16 Mis. (1 Bennett,) 273.]

Where the deed is merely a release, without covenants, the grantee is not estopped to deny the title and seisin of the grantor. Blight *v.* Rochester, 7 Wheat. 547; Fox *v.* Widgery, 4 Greenl. 214; Ham *v.* Ham, 2 Shepl. 351; [Sweetzer *v.* Lowell, 33 Maine, 446. A deed, purporting to convey the whole title, though without warranty, estops the grantor and his privies as to the legal title. Carter *v.* Chandron, 21 Ala. 72.

A grantee is not estopped from setting up a title, subsequently acquired by a covenant in a quitclaim deed in common form "to warrant and defend, &c. against all persons claiming by, from or under me," if such title is not derived from or under the grantor. Bell *v.* Twilight, 6 Foster, (N. H.) 401.

Where a widow claims dower against the grantee of her husband, such grantee and those claiming under him are not estopped from denying the husband's title. Coakley *v.* Perry, 3 Ohio, (N. S.) 344. A married woman who executes a warranty deed of her real estate having a date previous to her marriage, by the name which she then bore, with the fraudulent purpose of imposing upon some person to be affected by it, and without disclosing the fact of her marriage, does not thereby estop herself and her heirs from setting up her title in the land as against her grantee, or against a purchaser from him without notice, her deed being absolutely void. Lowell *v.* Daniels, 2 Gray, 161.

A member of a school district who agrees with a committee of the district to convey

by indenture, of lands wherein he has no estate at the time, and afterwards purchases those lands, the lease will be good; because the *lessor* is estopped to say that he did not demise them. If, however, such a lease be made *by deed poll*, the *lessee* will not be estopped from averring that the lessor had nothing in the land at the time when the lease was made; because the deed poll is only the deed of the lessor, whereas the indenture is the deed of both. (*a*)

65. *When an interest actually passes by a lease*, there is *no estoppel;* though the interest purported to be granted be really greater than the lessor, at that time, had power to grant. As if A, lessee for the life of B, makes a lease for years by indenture, and afterwards purchases the reversion in fee, and then B dies; A shall avoid his own lease, though the years expressed in the lease be not expired. (*b*)

66. If A, seised of ten acres, and B of other ten acres, join in a lease for years, by indenture, these are several leases, according to their several estates, and no estoppel is wrought by the indenture to either party; because each has an estate whereout such lease for years may be derived. For the reason why estoppels were at any time allowed was, because otherwise, when the party had nothing in the lands, the deed must be absolutely void. (*c*)

67. *Every estoppel ought to be reciprocal;* that is, to *bind both parties.* This is the reason that, regularly, a stranger shall neither take advantage nor be bound by an estoppel. *Privies in blood*, as the heir; *privies in estate*, as the feoffee, lessee, &c., *privies in law*, as lord by escheat, tenant by the curtesy, tenants in dower, and others that come in by act of law, or in the *post*, shall be bound, and take advantage of estoppels. (*d*) [1]

(*a*) 1 Inst. 352 a. 2 Bar. & Ald. 278. 1 Inst. 47 b. Plowd. 434.
(*b*) Idem. Isham *v.* Morrice, Cro. Car. 109.
(*c*) 1 Inst. 45 a. (*d*) 1 Inst. 352 a.

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to the district a lot for a school-house, and delivers them a deed thereof, taking their note in payment, is estopped to deny the authority of the committee to accept such deed. Case *v.* Benedict, 9 Cush. 540.]

[1] [A made a deed with full covenants of warranty, and after his grantee had been evicted, purchased a paramount title. Held, that such title did not enure to the grantee by way of estoppel, without his consent, so as to defeat his right to maintain an action on the covenant against incumbrances, and recover the consideration-money paid by

68. A lessee is *not estopped by the description of the lands* contained in his lease, for this is not the essence of the deed; he may, therefore, show that what is there called meadow, has been sometimes ploughed. (*a*) *257

69. It was formerly held, that conveyances to uses should be construed like wills; that is, according to the intention of the parties, though not expressed in the proper, legal, and technical words required in conveyances deriving their effect from the common law. This doctrine has been partly denied by Lord Hardwicke, who, in a case where the question was, whether, in a covenant to stand seised, the words were to be construed strictly, said:—"It is objected that there is *no warrant to construe a deed to uses*, as to the *limitations* and words of it, *in a greater latitude than a conveyance at common law*; and if construed in a different manner, would cause great confusion; which I hold to be true in general. For, the statute joining the estate and the use together, it becomes one entire conveyance, by force of the statute; and the words are to be construed the same way; but this is to be *taken with some restriction*. As to the *words of limitation* in a deed, they are, to be sure, to be construed in that manner, viz., in the same sense; but where they are *words of regulation or modification of the estate*, and not words of limitation, I think there is no harm in giving them greater latitude in deeds on the Statute of Uses, which are trusts at common law, than in feoffments, which are strict conveyances at common law." (*b*)

(*a*) Shipwith *v.* Green, 1 Stra. 618. Fairtitle *v.* Gilbert, 2 Term R. 169.

(*b*) Carter *v.* Ringstead, Cro. Eliz. 208. Leigh *v.* Brace, Carth. 349. Rigden *v.* Vallier, 2 Vez. 252. 3 Atk. 734.

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him, and interest. Blanchard *v.* Ellis, 1 Gray, 195. Where both plaintiff and defendant derive their title under a person once in possession claiming the fee, neither of them can show that such title is not subsisting and good, unless one of them can show that he has acquired another and better title from some other person. Johnson *v.* Watts, 1 Jones, Law, (N. C.) 228. See, also, Kissam *v.* Gaylord, Ib. 294. The assignee of a lease who enters upon and occupies the premises, is estopped in an action for rent brought against him by the original lessor, to deny the validity of the assignment of the original lessee to him. Blake *v.* Sanderson, 1 Gray, 332. One tenant in common conveyed to his co-tenant his undivided interest in a certain mill estate, "together with all the privileges and appurtenances thereto belonging," and afterwards parchased a lot of land on the same stream below. Held, that he was estopped from making any claim for diversion, while the water was used at the mill in the same manner as when he conveyed his interest in the mill. Olney *v.* Fenner, 2 R. I. 211.]

70. If it should be established that conveyances to uses, which are now become the common assurances of the realm, were to be construed in the same manner as wills, even with respect only to the words of regulation or modification of the estate; such a doctrine would, in some degree, tend to introduce all that latitude and uncertainty which now prevails in the construction of testamentary dispositions. Of this opinion was the late Mr. Booth, the most able conveyancer of the last century; who says, in one of his opinions, "If deeds of uses must be governed by the same rules as prevail with respect to wills, then a limitation to a man's male descendants, or male children, may create an estate in tail; and an absolute inheritance may pass by a limitation to the use of the grantee forever; which will produce infinite confusion." (*a*)

258* *71. Mr. Booth's opinion is confirmed by Lord C. J. Willes and his brethren, in the case of Tapner *v.* Marlott; where he says,—"As to what was insisted upon, that a conveyance to uses is to be construed as a will, and in a different manner from other conveyances, we are all clearly of a contrary opinion. For since the Statute of Uses, a use is turned into a legal estate, to all intents and purposes; it must be conveyed exactly in the same manner, and by the same words; and if it were otherwise, as most conveyances are now made by way of use, endless confusion would ensue." (*b*)

72. Lord Thurlow and Lord Kenyon have fully assented to this doctrine. Therefore it may now be laid down as settled, that *conveyances to uses are to be construed in the same manner as deeds deriving their effect from common law.* (*c*)

73. *Declarations of trust are construed in the same manner as common-law conveyances,* where an estate *is finally limited* by a deed, *without any kind of reference to a further execution of the trust,* by a conveyance *directed to be made.* For in such cases any occasional conveyance that may at any time be required of the legal estate from the trustees, may well be deemed a matter of form only; and not otherwise requisite than for the mere purpose of investing the subsisting trusts, whatever they may be, with their commensurate legal estates. (*d*)

(*a*) Booth, Cases and Opinions, Vol. II. 279.
(*b*) Willes's Rep. 180.
(*c*) 2 Bro. C. C. 288. 3 Term R. 765. 8 Term R. 519.
(*d*) Fearne Cont. Rem. 218, 4th ed.

74. ***But** a declaration of trust, whose effect is referred to another conveyance, directed to be made* for its establishment, which was formerly called an executory trust, may reasonably be considered as left to some degree of modification, by that supplemental part of the deed, viz. the conveyance to which the completion of the trusts is referred. And such conveyance may be directed to be made, so as to effectuate the intention of the person creating the trust, with less regard to the strict rules of construction, than in a case of a trust executed. (*a*)

75. ***Articles of agreement*** being only considered as preparatory to something which is to be completed afterwards, the construction of them is different from that of regular conveyances; it being a rule to look on them merely as the heads of what has been agreed upon between the parties, and only as minutes drawn up by them, to lay before counsel, in order to direct and guide them to carry the intent and scheme of the parties into execution. Therefore the Court of Chancery will mould them, *in such a manner as to comprehend what appears *259 to be *the manifest intent and design of the parties*, without paying a nice attention to the legal sense or operation of the words which may be made use of in framing the articles. (*b*)

76. This doctrine is particularly applicable to *articles of agreement made previous to marriage.* And where a covenant to convey property at a future time is inserted in a marriage settlement, it will be construed in the same manner as an article of agreement. (*c*) [1]

(77. By marriage articles it was agreed, that Sir R. Hill, the intended husband, should convey certain estates in strict settlement, and that the settlement should contain a power for him to charge the estates by way of mortgage with a limited sum of money, to discharge his debts, and also to charge the estates with another limited sum, for the benefit of younger children of the marriage; "*and likewise all other powers, provisions, clauses, covenants and agreements, usually inserted in settlements of the*

(*a*) *Idem.* 1 Atk. 608. 1 Vez. 103.
(*b*) 2 Atk. 545. Collect. Jur. Vol. II. 374.
(*c*) *Infra*, c. 23. Lincoln *v.* Newcastle, *infra*, c. 24.

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[1] On the subject of decrees in Chancery for the specific performance of agreements respecting land, see 2 Story on Eq. Jur. § 746–793 *b*.

like nature, and which shall be proper for effecting any of the purposes aforesaid." The articles appeared to be unskilfully drawn, the framer of them having attempted to give estates for life to unborn children, and estates tail to their issue. A bill being filed for specific performance, Shadwell, V. C., said—that seeing the framer of the articles meant to do more than the law would allow, he should not suppose that, by the general words he had used, he meant to do less than the law would admit of. His opinion, therefore, was that the person who prepared these articles, intended that any usual power, provision, clause, covenant or agreement, that would tend to the better enjoyment of the estates, should be inserted in the settlement; or, in other words, that the clause in question should be taken as if it had stood thus:—"And likewise all other powers, provisions, clauses, covenants and agreements, which shall be proper for effecting any of the purposes aforesaid, and which are usually inserted in settlements of the like nature;" *which would include every thing.*) (*a*)

(*a*) Hill *v.* Hill, 6 Sim. 186.

CHAP. XXI.

CONSTRUCTION — FORMAL PARTS OF A DEED.

SECT. 2. *Date.*
7. *Parties.*
10. *How to be described.*
22. *Recital.*
27. *Consideration.*
28. *Grant or Release.*
31. *Description of the Things granted.*
56. *Effect of Additions to the Description.*
63. *Clause respecting Deeds.*
65. *Exception.*
67. *Habendum.*
75. *Void when repugnant to the Premises.*
79. *But may qualify them.*
85. *Sometimes not controlled by the Premises.*
88. *Words of Limitation and Purchase.*

SECTION 1. Having stated the general rules and principles established for the construction of deeds, I shall proceed to the exposition of the formal parts of a deed, in the order in which they have been mentioned. (*a*) [1]

2. With respect to *the date of a deed*, which is the description of the time when it was made, by inserting the day of the month, the year of the King, and the year of our Lord, it may be placed either at the beginning or the end. In deeds indented, it is

(*a*) *Ante*, c. 2.

[1] An ordinary form of the deed poll, with the usual covenants, in general use in the United States, is substantially as follows:

"Know all men by these presents, that I (*naming the grantor, with his addition, &c.*) in consideration of —— dollars, paid by (*here naming the grantee*) the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said (*grantee*) (*here describing the premises.*)

"To have and to hold the above granted premises, with the privileges and appurtenances thereto belonging, to the said (*grantee*) his Heirs and Assigns, to their use and behoof forever. And I the said (*grantor*) do covenant with the said (*grantee*) that I am lawfully seised in fee of the aforegranted premises; that they are free from all incumbrances; that I have good right to sell and convey the same to the said (*grantee*) as aforesaid; and that I will, and my Heirs, Executors, and Administrators shall warrant and defend the same to the said (*grantee*) his Heirs and Assigns forever, against the lawful claims and demands of all persons.

"In witness whereof," &c.

now usually placed at the beginning; and in deeds poll, at the end.

3. In former times, deeds were not dated, because the limitation of prescription or time of memory often changed; and then it was held that a deed bearing date before the limited time of prescription, was not pleadable. But it became customary about the time of King Edward II., to insert the date in all deeds, which has been practised ever since. (*a*)

4. It is not, however, absolutely necessary that a deed should be dated, for, as has been already stated, if a deed has *no date*, or bears an *impossible date*, it will take effect from the time of its delivery; and the *time of the delivery* of deeds is presumed to be the time of their date, unless the contrary appears. (*b*)

261 * *5. Deeds take place according to the priority of their dates, or times of delivery; it being a maxim of the common law, *qui prior est tempore, potior est in jure.* It has, however, been shown that there are many cases where a purchaser or mortgagee may, by obtaining an assignment of a prior legal estate, obtain a preference over a person claiming under a prior deed; but this is because the deed by which such prior legal estate was created, is prior in point of time, to both the other deeds; and in consequence of the register acts, a deed duly registered will take place of a prior deed not registered. (*c*)

6. Where *two deeds bear the same date*, and manifestly contain but one agreement, that deed shall be presumed to be first executed, which will best support the clear intention of the parties. (*d*) [1]

(*a*) 1 Inst. 6 a. (Shep. Touchst. 55.)
(*b*) (*Supra*, c. 2, s. 61, and note.) Shep. Touch. 72.
(*c*) Tit. 12, c. 8. Tit. 15, c. 5. *Infra*, c. 29.
(*d*) Taylor *v.* Horde, 1 Burr. 106. Yelv. 138.

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[1] The law considers the execution of deeds as completed by the act of delivery, it being that alone which imparts vitality to the transaction. And the date is regarded only as *primâ facie* evidence of the time of the execution and delivery; liable, of course, to be controlled by proof *aliunde*. Wherever, therefore, several deeds, relating to the same subject-matter, and between the same parties, are delivered at the same time, they will be construed together, as parts of one entire agreement and transaction. Clap *v.* Draper, 4 Mass. 266; Quarles *v.* Quarles, Ibid. 687; King *v.* King, 7 Mass. 499; Carey *v.* Rawson, 8 Mass. 159; Jackson *v.* Dunsbagh, 1 Johns. Cas. 91; Jackson *v.* McKenney, 3 Wend. 233. And see Everitt *v.* Thomas, 1 Ired. 252; *ante*, tit. 16, ch. 1, § 11, 12, notes; Stetson *v.* Mass. &c. Ins. Co. 4 Mass. 336; Holbrook *v.* Finney, Ibid. 566;

7. With respect to the *parties to a deed*, they are either *active* or *passive*. Those who grant, demise, or release, are the active parties, and are called the grantors, lessors, and releasors; and those to whom lands are granted, demised, or released, are the passive parties, and called the grantees, lessees, or releasees.

8. If *several persons* join in a deed, *some of whom are capable* of conveying or taking, and *others incapable*, it shall enure and be construed as the deed of those only who are capable of conveying, and to those only who are capable of taking; for the incapacity of some of the parties will not render it invalid as to those who are capable. (*a*) [1]

9. Although a tenant for life can only grant away his own life-

(*a*) 1 Inst. 45 a. Shep. Touch. 81.

Thompson *v.* McClenachan, 17 S. & R. 110; *supra*, ch. 7, § 25, note; [Cloyes *v.* Sweetzer, 4 Cush. 403. And they may be construed together, although the parties in each of them are not the same persons. Gammon *v.* Freeman, 31 Maine, 243.] The identity of the subject-matter may be shown by evidence *aliunde*. Cornell *v.* Todd, 2 Denio, 130. See also, Doe *v.* Bernard, 7 Sm. & M. 319; Doolittle *v.* Blakesley, 4 Day, 265. [The question whether several deeds are part of the same transaction, or are separate and distinct transactions, depends on the surrounding circumstances, and not simply upon the fact, whether the deeds are or are not by express reference grafted into or connected with each other. Harman *v.* Richards, 17 Eng. Law and Eq. Rep. 548.]

An *indorsement*, also, upon a deed, is considered as a part of the instrument, if it appear to have been made at the time of the execution of the instrument. Brooke *v.* Smith, Moor. 679; Burgh *v.* Preston, 8 T. R. 489; Lyburn *v.* Warrington, 1 Stark. Rep. 130, [162]; Weeks *v.* Maillardet, 14 East, 568; Taylor's case, Hetl. 186, corrected in 14 East, 573, n., as to the word "*before*," instead of "*after*," in Hutton's opinion; Stocking *v.* Fairchild, 5 Pick. 181; Williams *v.* Handley, 3 Bibb, 10; [Armstrong *v.* Stovall, 26 Miss. 4 Cushm. 275.]

Whether the fact, that the indorsement was made when the instrument was delivered, must be shown affirmatively, by the party claiming under it, or will be presumed, where nothing appears to the contrary, as in the case of an alteration in a deed,—*quære*. In Emerson *v.* Murray, 4 N. Hamp. 171, it was held that the party must show it affirmatively. As to the law in regard to alterations, see 1 Greenl. on Evid. § 564.

Where a deed contains an express reference to another instrument or writing, clearly identified, and intended to be resorted to for completeness of description or understanding, it will be taken as an integral part of the deed, and be construed with it. Field *v.* Haston, 8 Shepl. 69; Izard *v.* Montgomery, 1 Nott & McCord, 381; Allen *v.* Bates, 6 Pick. 460; Foss *v.* Crisp, 20 Pick. 121; [Flagg *v.* Bean, 5 Foster, (N. H.) 49; Newmarket Man. Co. *v.* Pendergast, 4 Ib. 54.] So, if the reference is to a plan, the plan becomes, in legal estimation, part of the deed. Thomas *v.* Hatch, 3 Sumn. 170; Thomas *v.* Patten, 1 Shepl. 329. And see McEachern *v.* Ferguson, 8 Kerr, 242.

[1] See Elliot *v.* Davis, 2 B. & P. 338; Underhill *v.* Horwood, 10 Ves. 225; Fletcher *v.* Dyche, 2 T. R. 32; Gerard *v.* Basse, 1 Dal. 119; Green *v.* Beals, 2 Caines, 254; Clement *v.* Brush, 3 Johns. Cas. 180; Scott *v.* Whipple, 5 Greenl. 336.

estate, yet, if he is joined in the deed by the remainder-man or reversioner, they may together convey away the inheritance; for each passes his own estate. (*a*)[1]

10. *The parties* to a deed ought to be *described* by their proper christian and surnames, their rank, profession, and place of residence.[2] But mistakes in the description of the parties will not,

(*a*) 1 Rep. 76 a. 6 Rep. 14 b.

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[1] [The deed of a mortgagee in possession of the mortgaged premises, will convey his rights under the mortgage. Lamprey *v.* Nudd, 9 Foster, (N. H.) 299. A deed, purported to be made by husband and wife, in the right of the wife. Each of them owned several shares of the property conveyed. The number of shares described to be conveyed, was sufficient to include the interest of both. *Held*, that the deed passed the shares of both husband and wife. Emerson *v.* White, Ib. 482.]

[2] To constitute one a party to a deed, something more than mere signing and sealing is ordinarily requisite; the reason of his so doing must be apparent from the language of the deed; by his being either expressly named or sufficiently described as a party, or by his executing a deed poll alone, in which the grantor speaks only by the personal pronoun I, without mention of his name. Perk. § 36. Thus, where the wife joined with the husband in the formal execution of his deed, in the body of which no mention of her or of the purpose of her signing was made, it was held that this did not operate to bar her dower, nor otherwise to bind her. Catlin *v.* Ware, 9 Mass. 218; Lufkin *v.* Curtis, 13 Mass. 223; Powell *v.* Monson, 3 Mason, 349; *ante*, tit. 6, ch. 4, § 14. But where a deed of conveyance in fee was made to M. B., described as the wife of N. B., and, at the same time, a mortgage of the same premises was made by her to the grantor, by a deed poll, which her husband, though not named as a party in the body of the instrument, signed, sealed, and acknowledged, jointly with her, as his free act and deed, it was held that he was sufficiently described as a party to the transaction, and that the title of the mortgagee was good, against one claiming under a subsequent deed from the husband and wife. Elliot *v.* Sleeper, 2 N. Hamp. 525. So, where, in an indenture of apprenticeship, reciting the consent of the parent or guardian, and containing covenants both of the master and the apprentice, it concluded by saying that "for the true performance of the covenants aforesaid, the parties bind themselves each to the other," &c., it was held that the parent or guardian, by affixing his seal and signature, became bound for the performance of the covenants on the part of the minor. Mead *v.* Billings, 10 Johns. 99; Whitley *v.* Loftus, 8 Mod. 190; Branch *v.* Ewington, 2 Doug. 518; Bull *v.* Follet, 5 Cowen, 170.

But where the instrument contains no such clause, expressly binding the parties to performance, but concludes with the usual *testimonium* clause only, it is held that the signature and seal of the parent or guardian imports merely his consent to the apprenticeship, and he is not bound. Blunt *v.* Melcher, 2 Mass. 229; Holbrook *v.* Bullard, 10 Pick. 68; Chapman *v.* Crane, 2 Applet. 172; Ackley *v.* Hoskins, 14 Johns. 374; Sacket *v.* Johnson, 3 Blackf. 61.

If the grantee, on the other hand, is not sufficiently designated, the deed is void. Garnett *v.* Garnett, 7 Monr. 545. [See Morse *v.* Carpenter, 19 Vt. 618. The grantees in a deed were described as "the legatees and devisees of Anthony Bledsoe, deceased." The deed by this description necessarily refers to the will of Bledsoe to ascertain the persons who are such "legatees and devisees," and thus far incorporates it. It contains,

unless very gross, make a deed void; for if the description, however imperfect, is sufficient to distinguish the person described from all others, it will be good. *Nihil facit error nominis, cum de corpore constat.* (a)[1]

11. Persons who have several Christian names, as Thomas Henry, &c., frequently use only the first name; and in that case, if they are described in a deed by the first name only, it will be good. For this, there is an authority in Bracton, who, speaking *of legal proceedings, in which the description of the parties should be particularly accurate, says: *Si quis binominis fuerit, sive in nomine proprio, sive in cognomine, illud nomen tenendum erit, quo solet frequentius appellari.* (b)[2] *262

12. If lands be granted to *Robert*, Earl of Pembroke, when his name is *Henry*, or to *George*, Bishop of Norwich, when his name is *John*, it will be good. For in these and the like cases, no doubt or uncertainty can arise, as there can be but one person having those dignities. (c)

(a) Shep. Touch. 233. (b) Bracton, 188 b.
(c) 1 Inst. 3 a. 7 Bing. 455.

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therefore, a sufficient description of the grantees. Webb *et al.* v. Den, 17 How. U. S. 576. A deed to certain persons, as "Trustees of the Presbyterian Congregation of Cincinnati and their successors forever, for the use, &c. of said congregation," there being then but one such congregation, is not void for uncertainty as to the beneficiaries of the trust, though they were not then incorporated. Williams v. First Presb. Soc. 1 Ohio, State R. 478. The words "legal representatives," used in a deed, are so loose and uncertain, that they cannot be acted on by the Court, unless some context be found in the deed to explain them. Tipping v. Howard, 6 Eng. Law and Eq. 99. When there is no grantee named in the granting part of a deed, the party named in the *habendum*, may take. And where the grantor is named as grantee, the same rule applies as if no grantee were named. Irwin v. Longworth, 20 Ohio, 581.]

[1] For the exposition of this maxim, and how far evidence *dehors* the instrument, is admissible to identify the person intended, see Broom's Legal Maxims, p. 269; Bacon's Maxims, Reg. 13, p. 54; Ibid. Reg. 25, p. 86; Wigram on the Interpretation of Wills, Prop. VII. p. 101–169; 1 Greenl. on Evid. § 287–291.

[Evidence tending to show that a grantee is sometimes known as Eli Nicks, and sometimes as Elias Nicks, does not vary or contradict a grant to Elias Nicks. Henderson v. Hackney, 16 Geo. 521. Evidence is not admissible to show that the name of the grantee in a deed was inserted therein in consequence of a mistake of the scrivener, in the place of that of another person, who was intended as the grantee, and who entered upon and afterwards occupied the land. Crawford v. Spencer, 8 Cush. 418; Den v. Hay, 1 New Jersey, 174.]

[2] The law recognizes but one baptismal or Christian name; and therefore, if the middle name be omitted, in a conveyance, the omission is not material. Dunn v. Gaines, 1 McLean, 221.

13. It is said, by Lord Holt, that a grant to a Duke's eldest son, by the name of *marquis*, or to the eldest son of a marquis, by the name of *earl, et sic de similibus*, would be good; because of the common courtesy of England, and their places in heraldry. (*a*)

14. *A "wife"* is a good name of purchase, *without a Christian name;* and so it is if a Christian name be *added, and mistaken;* for *utile per inutile non vitiatur*. But if an ordinary person grants by his surname only, without any name of baptism, or by his name of baptism, without any surname, in these and the like cases, the deed will be void for uncertainty, unless there be some other matter in the deed to help it, or something done after to supply the defect. (*b*)

15. A *name acquired by reputation* only, will be considered as a sufficient description; for all surnames were originally acquired by reputation.[1] Hence, it has often been held that a bastard is sufficiently described by the name by which he has been usually known. (*c*)

16. A person to whom *an estate in remainder* is limited, may be described in a deed, without mentioning either his christian or surname; as if a remainder is limited, *primogenito filio*, or *seniori puero*, of J. S., it will be good. And in the usual limitation of remainders to persons unborn, they are necessarily described in this manner. (*d*)

17. The word "*issue*" is a good description in a deed, and is equivalent to the words "*child*" or "*children;*" therefore a remainder to the issue, or issue of the body of A, is good. (*e*)[2]

(*a*) Carth. 440. (*b*) 1 Inst. 3 a.
(*c*) 1 Inst. 3 a. (*d*) Idem. (Hornbeck *v.* Westbrook, 9 Johns. 73.) (*e*) Idem.

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[1] If a conveyance be made to "*P. H. & Son*," such being the mercantile style of their partnership, this is a sufficient description of the son, to enable him to take by the deed. Hoffman *v.* Porter, 2 Brock. 156. And if, in a conveyance to a mercantile house, by the name of their firm, some of the company are too imperfectly described to enable them to take, the others may nevertheless take by the deed, and will hold in trust for all the members of the firm. Beaman *v.* Whitney, 7 Shepl. 413.

[It seems that, where land is conveyed by deed to a firm, by their firm name, the deed may be aided by parol proof, showing the names of the particular individuals of which the firm was composed. Lindsay *v.* Hoke, 21 Ala. 542.]

[[2] The word "issue" in a marriage settlement, was held not to include grandchildren. Adams et al. *v.* Law, 17 How. U. S. 417. The words "legal representatives" used in a deed, are so loose and uncertain, that they cannot be acted on by the Court, unless

18. In consequence of the maxim that *nemo est hæres viventis*, an *immediate grant* to "*the heirs of A*," is void; but a *remainder* may be limited to "*the heirs of A*," which will be good if A dies *during the continuance of the particular estate, *263 or at the instant of its determination. A grant to "*the heirs*" of a person who is dead, is good (*a*); for in that case the word "*heirs*" is a sufficient description of the person intended to take; and even the word "*heir*," in the singular number, is a sufficient description, by which an estate may be limited. (*b*)

19. A limitation *in remainder* to "*the right heirs of A and B*," will give to such heirs, if their parents die during the particular estate, an estate in common. But a limitation to the heirs of husband and wife, will be considered as a limitation to the heirs of both, according to that relation; that is, to the children of both. (*c*)

20. Lord Coke says, if a remainder is limited to the heirs female of the body of A, and A dies leaving a son and a daughter, the daughter can take nothing by this limitation, because she is not heir; for the person claiming under such a description must fully answer it; and consequently, a person having only half the description will be excluded. Now the description consists of two parts; one, requiring that the donee should be heir; the other, that the donee should be a female; and in the case put by Lord Coke, the daughter is not heir, she having a brother. This doctrine has been controverted; it is, however, very ably defended by Mr. Hargrave, in his note to this passage. But in a subsequent note, he has mentioned a case, in which the Court of Exchequer refused to apply the rule to a marriage settlement; and held, that a limitation to the heirs female of the body of the settlor was good, though the persons answering that description was not also heir general. (*d*)

(*a*) Tit. 16, c. 1, s. 20. (Hall *v.* Leonard, 1 Pick. 27. Broom's Leg. Max. 223. Shaw *v.* Loud, 12 Mass. 447. Sargent *v.* Simpson, 8 Greenl. 148. Hunt *v.* Wickliffe, 2 Pet. 201.)

(*b*) Waker *v.* Snowe, Palm. 359. *Infra*, c. 23, § 30.

(*c*) 2 Roll. Ab. 417, pl. 6. Roe *v.* Quartley, 1 Term Rep. 630.

(*d*) 1 Inst. 24 b, n. 3. Bickford *v.* Pendarvis, 5 Bro. Parl. Ca. 93. 1 Inst. 164 a, n. Goodtitle *v.* Burtenshaw, Fearne's Cont. Rem. 8th ed. App. No. 1

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some context be found in the deed to explain them. Tipping *v.* Howard, 6 Eng. Law & Eq. 99.]

21. In *conveyances by or to corporations*, the description of the corporation must be such as to distinguish it from all other corporations. But there is no case where a grant by a corporation has been held void, on account of a variance in any of these four circumstances; namely, addition, interposition, omission, or commutation; if they retain the four first principles of substance, viz.: name of persons, of house, foundations, or dedications, places known before the foundation, in which the house is situate. (*a*)[1]

22. The *recital* is a narrative of such facts, assurances, and agreements, as are necessary to explain the grantor's title, and the motives and reasons upon which the deed is founded.

264* And* although recitals are not absolutely necessary, yet they are now usually inserted in all deeds, for the purpose of showing the origin and derivation of the title; or of stating such facts as are connected with, or relate to, the subject-matter of the deed.

23. A *mis-recital of a former grant* will not invalidate a deed. As where a person made a lease, *habendum* from the feast of the Purification; afterwards reciting the lease as granted from the feast of the Annunciation, he granted the reversion; it was held good. In a subsequent case, it was held, that a mis-recital of the estate of the grantor in the land, or of the date of the deed by which he acquired the land, did not invalidate a deed. (*b*)

24. It is laid down by Lord Coke, that a recital does not conclude, because it is no direct affirmation. But it has been since held, that though a person shall *not be estopped by a gen-*

(*a*) Fanshawe's case, Moo. 235.

(*b*) Withes *v.* Casson, Hob. 128. Lewen *v.* Mody, 3 Leon. 135. Cro. Jac. 127. Jerman *v.* Orchard, Skin. 528, 543. S. C. Show. P. C. 199.

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[1] A deed to "the inhabitants of the county of A," or to "the inhabitants of the town of B," is good, if the county or town be incorporated; but if not incorporated, and the territorial limits therefore uncertain, the deed would be void for the uncertainty of parties. Hornbeck *v.* Westbrook, 9 Johns. 73; Jackson *v.* Cory, 8 Johns. 385. But it seems that a grant to the inhabitants of a territory, precisely described and bounded, may be good. Thomas *v.* Marshfield, 10 Pick. 364, 367. [See also Williams *v.* First Presbyt. Soc. in Cincinnati, 1 Ohio, State R. 478.]

eral recital, yet he *may be estopped by the recital of a particular fact.* (*a*)[1]

25. Thus, where it was recited in the condition of a bond, that the obligor had received "*sundry sums of money*" for the obligee, which he had not brought to account, but acknowledged that a balance was due to the obligee; it was held that the obligor was estopped to say that he had not received any money for the use of the obligee. (*b*)

26. Where it can be proved that *a deed was actually executed*, and is *lost*, the *recital of it in another deed* is evidence of it. (*c*)[2]

27. After the recitals, comes the witnessing part; which begins with a statement of the *consideration*, and if it is a pecuniary one, the payment of it is mentioned, the grantor acknowledges the receipt of it, and releases the grantee from its payment. It is also *usual and proper* to *indorse a receipt* for the consideration on the back of the deed, signed by the party who receives the money. (*d*)[3]

28. The next thing is *the grant or release* by which the lands are transferred. The technical words, where necessary, by which this transfer is made, differ according to the different kinds of conveyance, and have been already stated.[4]

(*a*) 1 Inst. 352 b. 2 Bar. & Adol. 278. (*Supra*, ch. 20, § 64, note. Huntington *v.* Havens, 5 Johns. Ch. 23, 26.)

(*b*) Shelly *v.* Wright, Willes, R. 9. (*c*) Ford *v.* Grey, 6 Mod. 45. *Ante*, c. 11.

(*d*) 2 Pres. Conv. 428. 3 Prest. Abst. 15, 16. 2 P. Will. 291. 2 Taunt. 141. 1 Ch. Rep. 93.

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[1] See, as to the conclusiveness of recitals, 1 Greenl. Evid. § 23, 26. [Demeyer *v.* Legg, 18 Barb. Sup. Ct. 14; McBurney *v.* Cutler, Ib. 203; Champlain, &c., R. R. Co. *v.* Valentine, 19 Ib. 484; Kaine *v.* Denniston, 22 Penn. (10 Harris,) 202; Robbins *v.* McMillan, 26 Miss. (4 Cushm.) 434. A party will not be prejudiced by the recitals in a deed which was executed under judicial compulsion. McDougald *v.* Doherty, 11 Geo. 570.]

[2] On the nature of secondary evidence, and when it is admissible, see 1 Greenl. Evid. § 84, note (2).

[3] That the recital of the payment of the consideration-money is not in all cases conclusive, see 1 Greenl. Evid. § 26, note; *supra*, ch. 2, § 38, note; and ch. 20, § 52, note.

[4] [An instrument in form a deed, containing a clause of warranty, attested by two witnesses, and conveying realty and personalty by the words "at my death I do hereby give and grant unto my son," was held, under the circumstances under which it was given, to be a deed and not a will. Golding *v.* Golding, 24 Ala. 129; see also Stevenson *v.* Huddleson, 13 B. Mon. 299.

The words "assign and make over," in a deed duly executed, are sufficient to pass a freehold. Hutchins *v.* Carleton, 19 N. H. 487, 515; see Brown *v.* Manter, 1 Foster,

29. It should however be observed, that some difference of opinion has existed respecting the necessity of the word
265 * "*grant.*" * Sir J. Palmer thought, that in a deed to pass an inheritance, where there was a common in gross, the word "*grant,*" was *absolutely necessary;* for it could not pass by the livery; from which it was supposed that incorporeal hereditaments, severed from the inheritance, could only pass by the word "*grant.*" This must however be *confined to feoffments;* for in conveyances derived from the *Statute of Uses,* advowsons, commons, and all other incorporeal hereditaments, may be conveyed *without the word* "*grant.*" (*a*)

30. When any thing is granted, *all the means to attain* it, and all the fruits and effects of it, are also granted, and will pass *inclusive,* together with the thing itself, without the words "*cum pertinentiis;*" for it is a maxim, *cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit.*[1]

(*a*) Bridgeman's Conveyan. Vol. I. 323. *Ante,* c. 9.

(N. H.) 528. The words "mortgage, assign, and transfer," in a deed, will pass the legal estate. Gambril *v.* Doe, 8 Blackf. 140.]

[1] See Broom's Legal Maxims, p. 198, and 1 Saund. 323, note (6), by Williams, where this maxim is illustrated. [Rood *v.* N. Y. & E. R. R. Co. 18 Barb. Sup. Ct. 80. A license to build a tomb in a burying-yard, conveys also a right of suitable access thereto. A license from a mother to a son to open the family tomb, to deposit therein the corpse of a deceased son, will be implied from the relation of the parties, the exigencies of the case, and the usages and customs of a civilized community. Lakin *v.* Ames, 10 Cush. 198.]

"*Appurtenant,*" is that which is used with, and related to, or dependent upon, another thing more worthy, and agreeing in its nature and quality with the thing whereto it is appurtenant. Leonard *v.* White, 8 Mass. 8, per Sedgwick, J.; 1 Inst. 121 b, 122 a; Harris *v.* Elliott, 10 Pet. 54, per Thompson, J.; see also Smith *v.* Martin, 2 Saund. 400, note (2,) by Williams; Whalley *v.* Thompson, 1 B. & P. 371; James *v.* Plant, 4 Ad. & El. 749.

It follows that *land* cannot be "*appurtenant*" to *land,* for both are equally worthy in the estimation of law. But it does not follow that the word "appurtenances" may not in some cases be so used as to show the intent of the party to convey land, under that designation. For under the grant of a thing, every thing passes, which is part and parcel thereof. The doctrine on this point was clearly expounded by Story, J., in Whitney *v.* Olney, 3 Mason, 280; where the question was, whether, by the devise of a *mill and appurtenances,* the land under and adjoining the mill, which was necessary to its beneficial use, and was actually used with it, passed. And he held that it did.—"I do not proceed," said he, "upon the ground, that the land was a mere appurtenance to the mill; but that it was parcel thereof. It is true, that land cannot strictly be appurtenant to land, so as to pass under the term "appurtenances;" (Com. Dig. Grant, E. 9; Plowden, 170; Doane *v.* Broad Street Association, 6 Mass. R. 332; Buck *v.* Nurton,

Thus, if a person grants a piece of ground in the middle of his estate; he at the same time impliedly grants a way to it, and

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1 Bos. & Pull. 53;) but where the intention is clearly expressed, that land should pass under that name, the law will give effect to the grant, notwithstanding the misnomer. Thus, where it was averred in pleading, that certain land was appertaining to a messuage; the Court held, that in point of law, it could not be appurtenant to the messuage; but that it was nevertheless well in a grant, because it shall be intended to mean such land as is usually occupied with the messuage or lying with the messuage; and therefore a demise of a messuage, "with the lands to the same appertaining," is good to pass such lands as were usually occupied, used, or lying with the messuage: Plowden, 170; see also Bryan *v.* Wetherhead, Cro. Car. 17; Hearn *v.* Allen, Cro. Car. 57; Gennings *v.* Lake, Cro. Car. 168, 169; Com. Dig. Grant, E. 9. If this be so in a grant, the law will construe the words still more favorably in a devise. Therefore, in Boocher *v.* Samford, (Cro. Eliz. 113,) it was held, that lands usually occupied with a house, though at a distance from it, might well pass by a devise of it, as a tenement with its appurtenances, *in which H. dwelleth in E.* See also Cro. Eliz. 704; Com. Dig. Grant, E. 9, 10; 1 Bos. & Pull. 53; 1 P. Will. 603; 3 Wils. R. 141; 2 Wm. Black. 1148; Doe *v.* Collins, 2 Term R. 498. In these cases the lands pass, not as appurtenances, but as parcel of the granted or devised premises, upon the intention of the parties collected from the instrument, and explained by reference to the facts.

But in the present case I lay no stress whatsoever upon the words in the devise, "with the appurtenances." The land under the mill and adjacent thereto, so far as necessary to its use, and commonly used with it, passed by force of the word "mill." It is not necessary, in order to pass lands, that they should be specially designated by that name. A grant of a *messuage* conveys all the land within the curtilage thereof; so the grant of a *house*. Shep. Touchstone, 94; Com. Dig. Grant, E. 6. The only ground, upon which a doubt could be entertained, is a *dictum* in Lord Chief Baron Comyn's Digest, (Grant, E. 9,) where he says, "by the grant of a mill *cum pertinentiis*, the *close* where the *mill* is, or the kiln there, does not pass without more;" and for this he cites 1 Sid. 211; 1 Lev. 131, which are different reports of the same case. The case itself does not support any such doctrine. The question there was, not whether the land, on which the mill stood, passed under a grant of the *mills* with the *appurtenances*, but whether a kiln on another part of the close passed under the word "appurtenances." And the Court held, that it did not, "for by the grant of a messuage or lands *cum pertinentiis*, any other land or thing cannot pass, though by the words *cum terris pertinentibus*, it would. And Windham, J., said, if all the matter had been found, and that the kiln was necessary for the use of the mill, and without which it could not be useful, the kiln had passed as *part* of the mill, though not as *appurtenances*. In the English translation of Levinz's Reports, by Serjeant Salkeld, there is an error, which probably led to the mistake. It is there said, "And whether the kiln and the parts of the close, on which they [i. e. the *mills*] stood, should pass to the plaintiff, was the question." The original is, "*et si le kill et le parts del close, sur que il estoit* [i. e. the kiln stood] *passe al Plaintiff fut le question. Et tenu clerement que ils* [il] *ne passe.*" The case is much more fully and accurately reported in 1 Keble R. 736, where the facts are stated as found on a special verdict. O. was seised of a manor and messuage, and a close, and having two mills on the west side, and of a kiln, *which he newly erected on the other side;* then by metes and bounds he divided the close, and enfeoffed the plaintiff of the *west* part of the close, and *the mills with the appurtenances;* afterwards he assigned

the grantee may pass over the land of the grantor for that purpose, without being guilty of a trespass.(*a*)

31. The grant or release is immediately followed by the *description of the things granted*, which cannot be too minute and accurate.[1] Every thing intended to be conveyed should be par-

(*a*) Shep. Touch. 89. Fitz. N. B. 1 and 3. *Ante*, tit. 24, s. 10.

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the *other part of the close* with the manor to the defendant; and "whether to these ancient mills, the kiln will, being severed, *pass as appurtenant*, having been enjoyed and used" with them, was the question. The Court held, that it did not. Keeling, C. J., said, "It passeth not, being neither found necessary, or belonging to the mill." Windham, J., said, that the special verdict was short, and that it did not appear, that it was a kiln purposely erected for the use of the mill, "in which case it would have been parcel." And in substance this is the same as may be gathered from the brief note in 1 Siderfin. So that the case, when examined, proceeds upon a principle recognizing that which has been adopted by this Court.

"The good sense of the doctrine on this subject is, that under the grant of a thing, whatever is parcel of it, or of the essence of it, or necessary to its beneficial use and enjoyment, or in common intendment is included in it, passes to the grantee. In common sense and in legal interpretation, a mill does not mean merely the building, in which the business is carried on, but includes the site, dam, and other things annexed to the freehold, necessary for its beneficial enjoyment." See also United States *v.* Appleton, 1 Sumn. 492, where the subject is again discussed by the same learned Judge. [A deed of a "saw-mill," the sills of a part of which rest upon another mill owned by the same grantor, transfers to the grantee the right to continue that connection during the existence of his mill, and while such connecting timbers last. Jordan *v.* Otis, 38 Maine, (3 Heath,) 429.] Other applications of the doctrine are found in the following cases. Pickering *v.* Stapler, 5 S. & R. 107, 110, 111; Blaine *v.* Chambers, 1 S. & R. 169; Hasty *v.* Johnson, 3 Greenl. 282; Blake *v.* Clark, 6 Greenl. 436; Hill *v.* West, 4 Yeates, 142; New Ipswich Factory *v.* Batchelder, 3 N. Hamp. 190; Gibson *v.* Brockway, 8 N. Hamp. 465; Allen *v.* Scott, 21 Pick. 25; Ashby *v.* Eastern Rail R. Co. 5 Met. 368; Grant *v.* Chase, 17 Mass. 443; Otis *v.* Smith, 9 Pick. 293; Manning *v.* Smith, 6 Conn. 289; Doane *v.* Broad Street Association, 6 Mass. 332; Murphy *v.* Campbell, 4 Barr, 480, 484; Swartz *v.* Swartz, Ib. 353; Atkins *v.* Bordman, 2 Met. 457, 464. [Where a tract of land is conveyed with all the "creeks, harbors, rivers, &c.," within the boundaries named, lands covered with water in a creek, pass by the grant. The People *v.* Schermerhorn, 19 Barb. Sup. Ct. 540. In a lease of a furnace, grist and saw-mills, the right to the use of the water of the stream on which the furnace and mills are situated, it being necessary to the enjoyment of the estate, passes under the lease. Peters *v.* Grubb, 21 Penn. (9 Harris, 455.) See also Wyman *v.* Farrar, 35 Maine, (5 Red.) 64; Lothrop *v.* Blake, 3 Foster, (N. H.) 46; Deshon *v.* Porter, 38 Maine, (3 Heath,) 289.

A right of way appurtenant to land, passes by a deed of the land, without express mention of such right, or of privileges and appurtenances, and this notwithstanding certain words of reservation, for which see the case, Brown *v.* Thissel, 6 Cush. 254. A grant of land bounded "on the sea or flats," passes the flats appurtenant to the land granted. Saltonstall *v.* Long Wharf, 7 Cush. 195.]

[1] When the description of the premises intended to be conveyed is composed of

ticularly mentioned, and set down in its proper order; such as honors, manors, messuages, cottages, mills, dove-houses, gar-

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several particulars, all of which are necessary to ascertain the subject of the grant, nothing will pass except that which agrees with every particular of the description. 23 Am. Jur. 281. And when part of the description is to be rejected as false or repugnant to the grant, it must appear that the part retained completely fits the subject claimed, and that the rejected part does not; and that the whole description, including the part to be rejected, is applicable to no other thing. It must be shown, at least to the degree of moral probability, that there is no *corpus* that will answer the description in every particular. Mayo *v.* Blount, 1 Ired. 283; And see *supra*, ch. 20, § 25, note; Vose *v.* Handy, 2 Greenl. 322; Jackson *v.* Sprague, 1 Paine, 494; Keith *v.* Reynolds, 3 Greenl. 393; Cate *v.* Thayer, Ib. 71; Wing *v.* Burgis, 1 Shepl. 111. [If a particular description of land in a deed by metes and bounds, be uncertain and impossible, a general description in the same conveyance, will govern. Sawyer *v.* Kendall, 10 Cush. 241; Peaslee *v.* Gee, 19 N. H. 273.]

A reference, for description only, to a void deed to the grantor, is sufficient to convey such title as he in fact had, if the grantee is in possession. Hall *v.* Leonard, 1 Pick. 37. And see *supra*, § 6, note.

The additional mention of the quantity of land, as, containing *so many acres more or less*, is mere description, not importing any covenant. Mann *v.* Pearson, 2 Johns. 37; Powell *v.* Clark, 5 Mass. 355; [Reid *v.* Faunce, 37 Maine, (2 Heath,) 67; Bear *v.* Bear, 13 Penn. State R. (1 Harris,) 529.] So, where it was said "200 acres *by measure.*" Perkins *v.* Webster, 2 N. Hamp. 287. If the land is sufficiently described by metes and bounds, the grantee takes all within those limits, whether it be more or less than the number of acres stated. Large *v.* Penn, 6 S. & R. 488; [Emery *v.* Fowler, 38 Maine, (3 Heath,) 99; Chandler *v.* McCard, Ib. 564; Marsh *v.* Marshall, 19 N. H. 301; White *v.* Miller, 22 Vt. 380; Hunt *v.* Stull, 3 Md. Ch. Decis. 24; Marshall *v.* Bompart, 18 Mis. (3 Bennett,) 84; Krase *v.* Scripps, 11 Ill. 98. A deed described the land as containing so many acres, being part of a tract of eleven thousand seven hundred and thirty-two acres granted to A. B., situate, &c., and bounded, &c., as will more fully appear by reference to the annexed plat. Held, that the conveyance embraced all the land described by the plat, although a portion of it was outside of the grant to A. B. Evans *v.* Corley, 8 Rich. (S. C.) 315. A deed, describing the boundary line of the land conveyed, as running northerly a certain distance to a highway, and from thence upon the highway, passes the land to the centre of the highway, although the distance specified, by actual measurement, carries the line only to the southerly side of the highway. Newhall *v.* Ireson, 8 Cush. 595.]

The term "*adjacent*" ordinarily means *in the neighborhood of*, and not necessarily contiguous, unless, from the context, a different intention is apparent. Henderson *v.* Long, Cooke, R. 128.

The words, "*and all the buildings thereon*," have no legal operation, where the land itself is already described, as these pass by the conveyance of the land, as part of the realty. Crosby *v.* Parker, 4 Mass. 110; [Goff *v.* O'Connor, 16 Ill. 421.] But whether a thing fixed by A to the soil of D, becomes the property of B, is a question of fact and intention, to be settled by the jury. Wood *v.* Hewett, 10 Jur. 390. It has already been shown, that things personal in their nature, but fitted and prepared to be used with real estate, having been fixed to the realty, or used with it, and essential to its beneficial enjoyment, pass with the realty by the deed of conveyance. *Ante*, tit. 1, § 7. Such are

dens, orchards, lands, meadows, pastures, woods, underwoods, furzes, heaths, moors, rents, commons, fishings, warrens, mines,

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the machinery and movable apparatus of a "*mill*" or a "*factory*," the doors, window-blinds, &c., of a "*dwelling-house*," the manure and the fences on a "*farm*," and the like. Farrar *v.* Stackpole, 6 Greenl. 154; Kittredge *v.* Woods, 3 N. Hamp. 503; [Conner *v.* Coffin, 2 Foster, (N. H.) 538; Wetherbee *v.* Ellison, 19 Vt. 379; Conklin *v.* Parsons, 1 Chand. (Wisc,) 240;] Parsons *v.* Camp. 11 Conn. 525. So of the fencing materials, distributed in their proper place for immediate use. Ripley *v.* Paige, 12 Verm. 353.

If the land be described as bounded on a highway, street, or court, &c., this amounts to a covenant that there is such a way or street, &c. which the grantor will not be permitted to deny, nor be allowed to close or obstruct it. But if the width of the way or passage be mentioned, the grantor will not be understood to covenant for that particular width, but only for the width then actually existing, unless it be otherwise expressed. Clap *v.* McNeil, 4 Mass. 589; Pride *v.* Lunt, 1 Applet. 115; Parker *v.* Smith, 17 Mass. 413; [Sutherland *v.* Jackson, 32 Maine, 80; State *v.* Clements, Ib. 279; Greenwood *v.* Milton Railroad, 3 Foster, (N. H.) 261; Morgan *v.* Moore, 3 Gray, 319; Hammond *v.* McLaughlin, 1 Sandf. Sup. Ct. R. 323; Badeau *v.* Mead, 14 Barb. Sup. Ct. 328; 11 Ib. 390, 414; Moale *v.* Baltimore, 5 Md. 314. So, where the land is bounded "on a passage-way, two rods wide, *which is to be laid out* between the premises and the land of A," the grantor "to make and maintain all the fence between the said contemplated passage-way and the premises," the grantor and those claiming under him are estopped to deny the existence of the passage-way. Tufts *v.* Charlestown, 2 Gray, 271. The question whether this rule applies to a case where the boundary is on a private passage-way, raised but not decided. Morgan *v.* Moore, 3 Gray, 320. In case of land conveyed, abutting upon a highway, the presumption is that the parties intended to include the highway, but the contrary may be shown or gathered from the deed. Buck *v.* Squiers, 22 Vt. 484; Cole *v.* Haynes, Ib. 588.]

In ascertaining the subject conveyed, the intent governs, as in other cases of contract. And the deed must receive the same interpretation, which it would have received by the parties themselves, immediately after its execution. The subsequent development of facts cannot affect the interpretation. Nor will parol evidence of a mistake be received, at law, to control the description in the deed; the proper remedy in such cases being by a bill in chancery, distinctly alleging the mistake, so that an issue may be taken upon it. Van Wyck *v.* Wright, 18 Wend. 157; Linscott *v.* Fernald, 5 Greenl. 496; Bell *v.* Morse, 6 N. Hamp. 205.

[A deed granting "the right to use from the fountain-spring, by which the grantor's factory is now supplied, so much water as will pass through a pipe of equal diameter with one that conveys water from the spring, upon the same level therewith, to the grantor's factory," requires that each party should have half the water, and conduct it in such pipes as they see fit. Irwin *v.* The United States, 16 How. U. S. 513; Davis *v.* Mundy, 38 Maine, (3 Heath,) 90; Borst *v.* Empie, 1 Selden, (N. Y.) 33; Adams *v.* Warner, 23 Vt. 395; Cromwell *v.* Selden, 3 Comst. 253; Rood *v.* Johnson, 26 Vt. 64. A deed, describing the northerly boundary of the premises conveyed as "four feet north from the northerly side of the building now standing on the premises," includes the land on the northerly side of the building, to the distance of four feet from the edge of the eaves. Millett *v.* Fowle, 8 Cush. 150. But parol proof of extrinsic circumstances may be given to apply a description to its subject-matter, and if it appears that the description is in some respects erroneous, those parts may be rejected, and what is left,

advowsons, tithes and portions of tithes, oblations, hundreds, ways,† ferries, services, &c., all which should be described by

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if sufficient of itself, be alone regarded. Dodge *v.* Potter, 18 Barb. Sup. Ct. 193. Parol evidence is perfectly competent to fix, identify, or locate any boundary or local object, or mark called for by the deed, and then the deed adopts it and gives it effect; but it presupposes the actual existence of the local object, then presently existing or placed there by the parties as and for the monument or mark referred to in the deed. The entire absence of any monument or mark to which the deed refers, is not a latent ambiguity; it is a failure in the application of the deed to the subject, of the same character as if the deed in that respect had been left a blank. White *v.* Bliss, 8 Cush. 512; Atkinson *v.* Commins, 9 How. U. S. 679; Bosworth *v.* Sturtevant, 2 Cush. 392; Breeding *v.* Taylor, 13 B. Monroe, 477.]

The intent of the parties, where it is not otherwise apparent, is to be sought by giving the greater effect to those things, about which men are least liable to mistake. Davis *v.* Rainsford, 17 Mass. 210; McIver *v.* Walker, 9 Cranch, 178. And accordingly the objects by which land is described, are usually marshalled in the following order:

I. *Natural monuments.* Where these are given, the grant extends to them, however greater or less the distance or variant the course mentioned may be, if a different intent be not manifest from the deed. In *Massachusetts* and *Maine*, by the Colonial Ordinance of 1641, the owner of land bounded on the shore of the sea or of tide waters, holds the flats also, to the distance of one hundred rods, but not beyond low-water mark. Storer *v.* Freeman, 6 Mass. 435; Commonwealth *v.* Charlestown, 1 Pick. 180. So, in a part of *Virginia.* 1 Lomax, Dig. 515–517; [Pike *v.* Monroe, 36 Maine, (1 Heath,) 309; Lincoln *v.* Wilder, 29 Ib. (16 Shep.) 169; French *v.* Bankhead, 11 Gratt. (Va.) 136. See also Gough *v.* Bell, 2 New Jer. 441. The ebb of the tide, when from natural causes it ebbs the lowest, and not the average or common ebb, is to be taken as the low-water mark. Sparhawk *v.* Bullard, 1 Met. 95.]

The word "*shore*" includes the belt of land lying between high and low-water mark. Storer *v.* Freeman, *supra.* If the grant is bounded by "*high-water mark*," this is exclusive of the flats. Dunlap *v.* Stetson, 4 Mason, 349. So, "to the *bank* of the river," is generally exclusive of the stream. Hatch *v.* Dwight, 17 Mass. 298; Thomas *v.* Hatch, 3 Sumn. 178, 179. (But see Starr *v.* Child, 20 Wend. 149.) See also, as to the meaning of "*shore*," Child *v.* Starr, 4 Hill, N. Y. Rep. 375, 376, 380, 381; 5 Am. Law Journ. 200–206; Handley *v.* Anthony, 5 Wheat. 385; [Kingman *v.* Sparrow, 12 Barb. Sup. Ct. 201; Saltonstall *v.* Long Wharf, 7 Cush. 200. A "bank" is the continuous margin where vegetation ceases; the "shore" is the sandy space between it and low-water mark. McCollough *v.* Wainwright, 14 Penn. State R. (2 Harris,) 171. The word "beach" is construed to mean "land washed by the sea," and to be synonymous with "shore." Littlefield *v.* Littlefield, 28 Maine, 180.]

[The owner of land bordering on a cove where the sea ebbs and flows, who is entitled, under the colony ordinance of 1641, to the adjoining flats, to the low-water mark, cannot always claim the flats in the direction of the exterior lines of his upland, but only in the direction towards low-water mark, from the two corners of his upland at high-water mark. Rust *v.* Boston Mill Corporation, 6 Pick. 158. Where these lines

† [As to the construction of all "ways," &c., see Barlow *v.* Rhodes, 1 Cr. & Mees. 439.]

their situation, county, hundred, tithing or vill, hamlet and parish, number of acres and boundaries, and in whose tenure and occupation.

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strike a creek, or channel, or depression in which the sea ebbs and flows, and from which the tide does not ebb entirely, that is a terminus to the claim for flats in that direction. Sparhawk *v.* Bullard, 1 Met. 95. And the lines will ordinarily run to such channel in the most direct course. Walker *v.* Boston and M. R. R., 3 Cush. 23. Where a cove, inlet, or estuary, is so irregular and various in outline, and so traversed by crooked and meandering creeks and channels, from which the sea does not ebb, that in dividing the flats therein among the conterminous proprietors, it is impossible to apply the ordinary rules, in each case an equal and equitable division must be made, by as near an approximation as practicable to the rules which have been judicially established. Ib. See in this case, in 3 Cush., a plan illustrating the division thereof. The mode adopted in Maine, to ascertain such side lines, when in dispute, is stated in Emerson *v.* Taylor, 9 Greenl. R. 42. In the report of this case also there is a plan, illustrating the mode of division. See also O'Donnell *v.* Kelsey, 4 Sandf. Sup. Ct. (N. Y.) 202.]

But where the grant is bounded by or upon a fresh water "*river*," or "*stream*," or along the same, it is presumed that the grantor intended to convey the land to the middle or thread of the river, *usque ad filum aquæ;* and accordingly it is said, that the grantee is in such case entitled to hold to that extent, as of common right. See Angell on Watercourses, sec. 2, p. 3–10; 3 Kent, Comm. 427–432, 5th ed. and the cases there collected; 23 Am. Jur. 283–289; Greenleaf *v.* Kilton, 11 N. Hamp. 533; Luce *v.* Carley, 24 Wend. 453; Case *v.* Haight, 3 Wend. 635; Commissioners *v.* Kempshall, 26 Wend. 404.

[When lands are bounded by a stream, or river *not navigable*, or above tide water, the grantee takes *usque ad filum aquæ*, unless the stream or river be expressly excluded from the grant by the terms of the deed. Demeyer *v.* Legg, 18 Barb. Sup. Ct. 14; Walton *v.* Tifft, 14 Ib. 216; McCullough *v.* Wall, 4 Rich. 68; Canal Trustees *v.* Haven, 5 Gilman, 548; Shelton *v.* Maupin, 16 Mis. (1 Bennett,) 124; Lincoln *v.* Wilder, 29 Maine, (16 Shep.) 169. A grant bounding upon or along a *navigable* river, bay, &c., carries the title to high-water mark only. Gough *v.* Bell, 1 New Jersey, 156.]

And such intent is presumed wherever the "*river*" or "*stream*" is expressed as a boundary, even though other monuments, such as a tree, or a rock, are mentioned, standing on or near the bank; if there are no express words of exclusion. Lunt *v.* Holland, 14 Mass. 151; Thomas *v.* Hatch, 3 Sumn. 170; McCulloch *v.* Aten, 2 Ham. (Ohio R.) 425; Haye *v.* Bowman, 1 Rand. 420; [Luce *v.* Carley, 24 Wend. 453; Cold Spring Iron Works *v.* Tolland, 9 Cush. 492.] But this presumption of intent may be controlled, and the grant so limited as to exclude the river or stream, whenever an intent so to do is clearly apparent from the deed. Hargrave's note to 1 Inst. 261, a.; 20 Wend. 162, per Bronson, J., confirmed in Child *v.* Starr, 4 Hill, 369, 376; Nickerson *v.* Crawford, 4 Shepl. 245; The State *v.* Gilmanton, 9 N. Hamp. 461, 463; Canal Com'rs *v.* The People, 5 Wend. 443, 444; 17 Wend. 583, 597, S. C.; Deerfield *v.* Arms, 17 Pick. 42, 43.

[Towns bounded by, or on the Merrimac or Connecticut rivers, or by lines up or down the river, extend to the centre of the river. State *v.* Canterbury, 8 Foster, (N. H.) 195. See also Hanson *v.* Russell, Ib. 111; Boscawen *v.* Canterbury, 3 Ib. 188. See Howard *v.* Ingersoll, 13 How. U. S. 381. The common-law rule, respecting the construction of deeds bounding the premises by, along, or on a river, is not applicable to

32. The civil division of the kingdom was originally into counties, hundreds, and vills, tithings or townships; for parishes

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the Niagara River. Kingman *v.* Sparrow, 12 Barb. Sup. Ct. 201. Where the Mississippi River forms the boundary of two States, the middle of the river is the boundary line. Myers *v.* Perry, 1 La. Ann. R. 372.

Islands in rivers fall under the same rule as to the ownership of the soil and its incidents, as the soil under water does. If not otherwise lawfully appropriated, they belong to the riparian proprietor on one side, or are divided in severalty between the proprietors on both sides,—as the *filum aquæ* would run if the islands were under water. The *filum aquæ* is ascertained by measurement across from ordinary low-water mark on one side, to the same on the other side, without regard to the channel or depth of water. When the island is appropriated, the boundary is then midway between that and the main land. McCullough *v.* Wall, 4 Rich. 68. See also The Pea Patch Island, Wallace Jr. Rep. Appendix 9.

In a recent case in Massachusetts, (Hopkins Academy *v.* Dickinson, 9 Cush. 544,) Chief Justice Shaw gave the following learned decision in regard to the rights of the riparian proprietors, when a river, not navigable, had changed its course, and new land had formed in the old bed of the river:—

"The land in controversy is newly-made land, formed in what was formerly the bed of Connecticut River, lying between the towns of Hatfield and Hadley. It has been gradually formed, in consequence of a change in the bed of the river, in the manner hereafter stated. The demandants, trustees of an incorporated academy, are owners of a tract of land in Hadley, on the east side of Connecticut River, known as the school meadow land, bounded formerly by a curved line projecting considerably into the river. As long ago as 1805 or 1806, the water, in high freshets, began to find its way across the school meadow land. This increased from year to year, until the current was formed that way; and in 1825 a great portion, if not the main body of the stream, passed that way, thus taking a more direct line across, instead of following the former bend of the river. This continued to increase until it became the main channel, and the current through the old passage ceased. The new channel, thus formed, cut off and insulated the most projecting part of the school meadow land; the part, thus left, remained unchanged in position, and became an island, forming the right bank of the new stream as far as it extended.

"In the mean time land began to form in various places in the old bed of the river thus deserted by the current, between the school meadow lands, thus insulated, on the east side, and the Hatfield shore on the west. The old channel, or deepest part of the river before the change, was not in the middle of the river, but nearest the Hatfield shore.

"The tendency of the evidence was, to show that in all that part of the river bed, which had become stagnant by the change of current, sediment began to settle and accumulate, shoals and islets arose, detached, at first, but gradually uniting with each other; when above water, vegetation came in, and ultimately land was formed, which was available for use and valuable.

"The question is, whose property are the lands thus newly formed, and upon what legal principles shall the right of property in them be ascertained?

"It appears to be well settled by the law, both of this country and of England, and founded on the rule of the civil law, that on rivers not navigable, the right of the proprietors of the land on each side extends to the thread of the river, or middle line of

were divisions only in reference to ecclesiastical affairs, of which the common law took no notice; but in process of time, parishes became divisions in reference to civil matters.

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the stream. This is taken to be the law in this commonwealth, subject to certain rights of the public to use the water for boating and rafting, and subject also to regulations in regard to fisheries. These modifications or exceptions are not applicable to the present question.

"This question arises respecting the right of the riparian proprietors to certain lands formed in the bed of Connecticut River, between Hadley and Hatfield. This land, it appears by the case, was formed on a part of the soil which formerly constituted the deep bed and channel of the river, where the main current of water formerly flowed, in consequence of the river having changed its course and taken a new channel on the Hadley side. The effect of this has been, that the main body of the water has for some years flowed in a new channel, by means of which the water on the old bed of the river became stagnant, deposits of earth and sand were formed in various parts of it, which have gradually risen above the surface and united with each other so as to become valuable land. The question is, whose is this land?

"It has been repeatedly settled, both in this State and in Connecticut, that the Connecticut River, though valuable for the purposes of boating and rafting, yet, so far as riparian proprietorship is concerned, is considered a river not navigable, as that term is used in the common law. Adams *v.* Pease, 2 Conn. 481; Bardwell *v.* Ames, 22 Pick. 333.

"The general rule, as a rule of the common law of England, was long since laid down as unquestionable by Lord Holt, who says, in the case of Rex *v.* Wharton, Holt, 499, that a river, of common right, belongs to the proprietors of the land between which it runs, to each that part nearest his land. This has been frequently, if not uniformly, adopted as the established rule. Bac. Ab. tit. Prerogative; Sir John Davies's R. 155. And the same rule has been repeatedly declared and adjudged in this commonwealth. It is derived mainly from the rule, that the riparian proprietor is owner of the soil under the water, and by the general law of property becomes entitled as of right to all accessions.

"The general rule is recognized and established in this commonwealth, in the leading case of Ingraham *v.* Wilkinson, 4 Pick. 268. It is a case which goes far to settle principles which must govern the present. It recognizes the rule of the common law, that the property in the soil of rivers not navigable, subject to public easements, belongs to those whose lands border upon them; and from this right of property in the soil in the bed of the river the Court deduce the right of property in an island, which gradually arises above the surface and becomes valuable for use as land.. Assuming the thread of the river, as it was immediately before such island made its appearance, this rule assigns the whole island, or bare ground formed in the bed of the river, if it be wholly on one side of the thread of the river, to the owner on that side; but if it be so situated that it is partly on one side and partly on the other of the thread of the river, it shall be divided by such line, and held in severalty by the adjacent proprietors.

"This seems to be clear and intelligible, and has a direct bearing upon the present case. But the difficulty in applying the rule arises from this consideration, that, from the very nature of things, the thread of the river may itself be frequently changed by circumstances. Where there is a gradual accretion on one shore, forming an alluvion and permanent addition to that shore, it must tend to change the thread of the river,

33. There was a parish and also a vill called Street; and a person having lands in the vill of Street, and also lands in the

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by carrying the medium line towards the opposite shore. If, at the same time, with such accretion on one side, there be a wearing away of the opposite bank, the thread of the stream will be moved an equal distance in that direction. But if the river does not wear away on the opposite side, then the whole bed is narrowed, and the thread of the river will be moved to an extent equal to one half of the new formation, and in the same direction.

"So in the case just now supposed, of an island arising in the middle of the river, it is divided by that line which was the thread of the river immediately before the rise of the island. But that line must thenceforth cease to be the thread of the river, or *filum aquæ*, because the space it occupied has ceased to be covered with water. But, by the fact of an island being formed in the middle of the river, two streams are necessarily formed by the original river dividing it into two branches; the island itself, having become solid land, forms itself a bank of the new stream on the one side, and the old bank on the main shore forms the other. And the same rule applies on the other side of the island. There must, then, be a *filum aquæ* to each of these streams, whilst the old *filum aquæ* is obliterated to the extent to which land has taken the place of water. But this island, having all the characteristics of land, may soon be divided and subdivided, by conveyances and descents, and all the modes of transmission of property known to the law, and thus become the property of different owners. Now suppose another island formed in one of these branches, between the first island and the original main shore. It seems to us that it must be divided upon the same principle as the first; but, in doing it, it will be necessary to assume as the *filum aquæ* the middle line between the first island and the original river bank on that side.

"If this is a correct view of the practical consequences flowing from the adoption of the principle stated, and it appears to us that it is, an obvious difficulty presents itself, in making that line a fixed standard for the demarcation of the boundaries of real estate between coterminous proprietors, which is itself fluctuating and changeable. Perhaps a satisfactory answer to this may be found in the suggestion, that the rule is equitable, and as certain as the proverbially variable nature of the subject-matter will admit; and, in adapting it to the varying circumstances of different cases, a steady regard must be had to the great principle of equity, that of equality.

"This changing of the *filum aquæ* seems not to be distinctly treated in any case, but it seems that it must necessarily occur in many cases. In addition to those already mentioned, suppose a river, by slow accretions or washing away, widens or narrows on both sides as it may, but unequally, the *filum aquæ* must change its actual line. Suppose an island dividing a river for some distance shall be wholly washed away, the *filum aquæ* must shift and pass along a line which was formerly solid land. In a passage cited by Chief Justice Parker, in Ingraham *v.* Wilkinson, from Lord Hale, such a shifting of the *filum aquæ* in one case is alluded to. The passage is this: "If the *filum aquæ* divide itself, and one part take the east and the other the west, and leave an island in the middle between both *filæ*, the one half will belong to the one land and the other to the other." And Lord Hale adds further, in the same connection, "that this is to be understood of islands newly made; for if a part of an arm of the sea—and the same thing is true of a river, which is material to the present case—by a new recess from his ancient channel, encompass the land of another man, his propriety continues unaltered." Hargrave's Law Tracts, 37.

266 * * parish of Street, but not within the vill of Street, conveyed all his lands in Street. It was resolved that the

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"It may be added here, on the authority of Lord Hale, that he derives the title to islands, in creeks or havens or arms of the sea, from the right of property in the soil under the water, stating that this is *primâ facie* and of common right in the king; yet if, in point of propriety, it doth belong to a subject by grant or prescription, the islands that happen within the precincts of such private propriety of a subject, will belong to the subject. This is applicable, by strict analogy, to the case of a river not navigable, when the right of property is admitted to be in the riparian proprietor, *ad filum aquæ*.

"If this is a correct view of the general principle of law, and its modifications under certain changes, it seems to us sufficient to settle the present case. It appears that the demandants have long been owners of a tract of land situated in Hadley, and forming, for some distance, the east bank of Connecticut River. The tenant and other proprietors were owners of lands in Hatfield, forming the west bank or shore of Connecticut River, opposite the school meadow land. Many years ago the water of the river began to find its way, at first in small quantities and in high freshets, over the school lands, till at length it formed a deep cut, and ultimately the main or sole channel of the river. A small portion of the school lands, forming the original east bank of the river, was not washed away, but remained unaffected by the change. The old channel, on the west side of this portion of the school land, now become an island, being deserted by the current, began very slowly to fill up, and after many years, say twenty or more, became covered with vegetation; and this is the land which is the subject of this controversy.

"Now, as to this island, it is not newly made, but a portion of the old solid school land; it remains unchanged in site or character, and is, as it was before, the property of the demandants. It also remains a fixed portion of the easterly bank of that branch of Connecticut River, which now lies between that island and the Hatfield shore. There is nothing to show that the *filum aquæ* has changed to the extent up and down the river, to which this island still extends. Each who was then riparian proprietor, owned the soil under the river to that *filum aquæ* or thread of the river, and the newly-formed land will belong to them respectively to that line.

"In regard to the newly-formed land, if any, which lies further north, or further up stream than the head of the island constituting a part of the old school land, there is certainly more difficulty.

"If before these sand-banks, flats and islands began to form in the old bed of the river, this island had extended upwards, by alluvion strictly so called, it might have been deemed part of the school lot and of the island, and would have modified and regulated the *filum aquæ* to a like extent upwards. By alluvion here, we mean such slow, gradual, and insensible accretion, that it cannot be shown at what time it occurred; but we are not aware that it is claimed that this insular portion of the demandants' land was thus extended upwards by such insensible accretion, previously to the formation of the land in question. If it be claimed that it was, it will be a proper subject to be inquired into and reported on by the commissioners. When the head of the island, or school meadow land is ascertained, a line is to be struck across the river, at right angles to its general course, at such head of the island, and in all that part of the stream below such line, the thread of the river will be the middle line between the island and the Hatfield shore.

"Then we must consider that part of the river lying above the island, and here the

lands in the vill only passed; because, when Street was named generally, it must be understood of the vill only. (*a*)

(*a*) Stoke *v.* Pope, 2 Roll. Ab. 54.

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filum aquæ was probably modified by the great change in the bed of the river, in effect forming two streams, one each side of the insulated part. It is manifest that, by breaking out a new channel to the east, and yet retaining, at least for a considerable time, its old channel on the west, the river above the dividing point for some distance was more or less widened. It was a very slow process by which, in the more sluggish current on the west side, shoals, sand-bars, islets, and ultimately firm land were formed. In the mean time, the river had formed for itself a new east bank on the Hadley side, the old west bank remaining as it was on the Hatfield side. So long as that state of things continued, the *filum aquæ* would naturally be extended, forming the middle line between such old west bank and such new east bank. If this east bank was thus formed, and the thread of the river above the island thus was extended before the new land formed, then it appears to us that the law of proprietary division must be determined by the *filum aquæ*, as thus extended easterly, and that this rule must be applied to all that part of the island above a line drawn at right angles with the river, across it at the head of the island. All lying westerly, or on the Hatfield side of the *filum aquæ* thus ascertained, if any, belonging to the Hatfield proprietors, and all easterly of such *filum aquæ* to the school meadow proprietors, or the proprietors lying on that side.

"In ascertaining the thread of the river, it will be proper to take the middle line between the shores upon each side, without regard to the channel, or lowest and deepest part of the stream. And in ascertaining the shores, or water lines on each side, to measure, it will be proper to find what those lines are when the water is in its natural and ordinary stage at a medium height, neither swollen by freshets or shrunk by drought.

"These views, we think, embrace all the legal principles necessary to determine the right of property in these newly-formed lands, as between the opposite riparian proprietors. The division of these lands amongst the Hatfield proprietors themselves, will be regulated by the rule laid down in the case of Deerfield *v.* Arms, 17 Pick. 41. The effect of that rule is, to give each one a length on the new water line proportioned to his length on the old water line, whether the one be longer or shorter than the other. In applying that rule in this case, each Hatfield proprietor will have a line on the thread of the river, when ascertained, proportioned to his line on the Hatfield shore before the river filled up."]

The words "*to*," "*from*," and "*by*," used in reference to monuments and boundaries, are generally deemed words of exclusion, unless, by manifest implication, they are used in a different sense. If the boundary, *thus* referred to, is a "*river*," or "*stream*," or "*creek*," *eo nomine*, it is regarded as a manifest implication of an intent to *include* the river, stream, or creek, to the thread thereof. But if those words appear, upon the whole deed, to refer to the *bank* of the river or stream, they are deemed to *exclude* the water, or rather the land below the bank. Bradley *v.* Rice, 1 Shepl. 198, 201; Thomas *v.* Hatch, 3 Sumn. 170, 178, 179; Hatch *v.* Dwight, 17 Mass. 289, 298; Lapish *v.* Bangor Bank, 8 Greenl. 85, 92; Dunlap *v.* Stetson, 4 Mason, 349, 365, 366; Varick *v.* Smith, 9 Paige, 547; Alcock *v.* Little, 5 N. Hamp. 523; *Ex parte* Jennings, 6 Cowen, 518; Morrison *v.* Keen, 3 Greenl. 474; Hopkins *v.* Kent, 9 Ohio R. 13; Buckley *v.* Blackwell, 10 Ohio R. 508. So, the words, "*between* the slitting-mill and the forge-dam," were held exclusive of those boundaries. Revere *v.* Leonard, 1 Mass. 91, 93.

34. The word "*manor*" has a very extensive signification; for it will pass, I. All the demesnes, that is, all the lands whereof

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[The words "by land of" an adjoining owner, mean, along the external boundary line of that land. Peaslee *v.* Gee, 19 N. H. 273. The word "by," when descriptively used in a grant, does not mean in "immediate contact with," but "near" to the object to which it relates; and "near" is a relative term, meaning, when used in land patents, very unequal and different distances. Wilson *v.* Inloes, 6 Gill, 121.]

Where land is described as bounded by a *pond*, it is ordinarily understood to extend to the margin of the pond in its natural state, as far as the low-water line, but no further. Waterman *v.* Johnson, 13 Pick. 261; Lowell *v.* Robinson, 4 Shepl. 357. And if, at the time of the grant, the water of the pond was raised by artificial means, for the formation of a larger reservoir to supply the mills below, belonging to the same grantor, the grant will be understood as restricted to the margin of the pond as it then existed. Bradley *v.* Rice, 1 Shep. 198; [Wood *v.* Kelley, 30 Maine, (17 Shep.) 17.] But where the owner of the mills and of land adjoining the pond, which was then raised above its natural level, sold the mills, it was held that the right to the *then* existing head of water passed with the mills, as appurtenant; and that the grantor had no remedy for the subsequent flowing of the land; Hathorn *v.* Stinson, 1 Fairf. 224; but that, upon the removal of the dam and obstructions, and the consequent recession of the water, the owner of the land adjoining the pond, was entitled to hold exclusively to the natural margin of the pond. Hathorne *v.* Stinson, 3 Fairf. 183. From these cases, it is apparent that, where the lands sold are bound by a pond, raised above its natural state by artificial means, parol evidence is admissible to show which line of the margin of the pond, the natural or the artificial, the parties intended. 13 Pick. 265, 266. [See Berry *v.* Garland, 6 Foster, (N. H.) 473. The proprietors on the borders of the lakes take to low-water mark, unless otherwise limited by the terms of their grants. Champlain Railroad *v.* Valentine, 19 Barb. Sup. Ct. 484. See Dillingham *v.* Smith, 30 Maine, (17 Shep.) 370.]

It may be mentioned in this place that, where the lands granted are bounded by a *highway*, the grant is ordinarily understood to convey the fee to the centre of the road; *provided*, the grantor owned to that extent, and there be no words or specific description showing a contrary intent. 3 Kent, Comm. 434, 5th ed. But if the description be not doubtful, or if metes and bounds are set forth, which plainly exclude the road, no part of the soil and freehold of the road passes, by the grant. See Tyler *v.* Hammond, 11 Pick. 193, in which this point was very fully discussed and considered. Harris *v.* Elliott, 10 Pet. 25. The student will observe that the opinion of Chancellor Kent, that the grant of land bounded by a highway *always* extended to the centre of the road, like a grant bounded by a river, as stated in the first and second editions of his Commentaries, is qualified in the fourth edition, by adding the *proviso* above stated; doubtless after reviewing it by the light of the case of Tyler *v.* Hammond, *supra*. It is also to be noted that the universality of the rule, as it has obtained in Connecticut, is to be referred somewhat to the legislation in that State on the subject. See Peck *v.* Smith, 1 Conn. 103, 109. And it seems since to have been qualified, in substantial agreement with the rule stated in Tyler *v.* Hammond, *supra*. Watrous *v.* Southworth, 5 Conn. 305. And see Johnson *v.* Anderson, 6 Shepl. 76; Adams *v.* Saratoga, &c. Railroad Co. 4 Am. Law Journ. 49, N. S. Land bounded on a *highway*, extends *ad medium viæ*, by "*fixed legal intendment*." Ball *v.* Ball, Dist. Co. Pa. for Philadelphia Co.; Am. Law Journ. May, 1850, p. 499; where the doctrine is reviewed, per Stroud, J. [Where land

the lord is seised within the manor; and also the freehold of all the lands held by copyholders or other customary tenants, to-

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is described as bounding "to, on, or by a highway or river," the grant is presumed to include the fee of the soil to the centre of the highway or the river, if the fee be in the grantor, and the contrary does not appear in the deed or monument referred to therein; but where land is bounded "by the side of a highway," these words are presumed to exclude the highway, especially if this construction be consistent with the circumstances and subject-matter of the grant. Hughes *v.* Prov. and W. R. R. Co. 2 R. I. 508; Bizor *v.* Devereux, 16 Barb. Sup. Ct. 160.] Where the road has been voluntarily opened by the owner of the soil, as in the case of roads reserved by the proprietors of townships or smaller tracts, in the original location of the land into farms or building lots, there is strong ground to presume an intent to dedicate the fee itself to the public. But it is not easy to perceive how the mention of a highway as the limit *to which* the grant extends, can alone imply an intent to convey beyond that limit. The case of a river as a boundary does not seem analogous, as its breadth is constantly varying; and, moreover, it can neither be discontinued by law, nor become of further use to the owner. See the observations of Wilde, J., in 11 Pick. 213.

II. The next regard is usually had to *lines actually run, and corners and monuments actually marked and made, at the time of the grant.* Monuments, mentioned in the deed, but not then existing, if they are *forthwith* erected by both parties, with intent to conform to the deed and as the monuments therein mentioned, will be deemed contemporaneous with the deed, and will control the courses and distances therein given. Makepeace *v.* Bancroft, 12 Mass. 469; Davis *v.* Rainsford, 17 Mass. 207; Leonard *v.* Morrill, 2 N. Hamp. 197; Crafts *v.* Hibbard, 4 Met. 438, and cases there cited; Dunn *v.* Hayes, 8 Shepl. 76; *supra*, ch. 20, § 23, note. But not if they were erected for any other purpose. Ibid; Kennebec Prop'rs *v.* Tiffany, 1 Greenl. R. 219. But this rule yields to some exceptions. These monuments ordinarily govern, prevailing over courses and distances; unless, taking the whole deed together, a different intent appears, and the monuments are apparently erroneous. Davis *v.* Rainsford, *supra;* Pernam *v.* Wead, 6 Mass. 131; Aiken *v.* Sanford, 5 Mass. 497; Gerrish *v.* Bearce, 11 Mass. 188; Belden *v.* Seymour, 8 Conn. 304; Howe *v.* Bass, 2 Mass. 380; Smith *v.* Dodge, 2 N. Hamp. 303; [Smith *v.* McAllister, 14 Barb. Sup. Ct. 434; McGill *v.* Somers, 15 Mis. 80.] If no monuments are mentioned, evidence of long-continued occupation, though beyond the given distances, is admissible. Owen *v.* Bartholomew, 9 Pick. 520. Where the description is simply by reference to the *number* of the lot on a plan, which has been actually surveyed and a plan made accordingly, if there is a disagreement between the plan and the monuments, the monuments will govern and control the plan. Brown *v.* Gay, 3 Greenl. 126; Esmond *v.* Tarbox, 7 Greenl. 61; Pike *v.* Dyke, 2 Greenl. 213; Ripley *v.* Berry, 5 Greenl. 24. [And where land is first described as lot of a certain number, and it is afterwards more specifically described by monuments, courses, and distances, the definite boundaries may limit the description by the number. Haynes *v.* Young, 36 Maine, (1 Heath,) 557. See also, Literary Fund *v.* Clark, 9 Ired. (N. C.) 58; Riley *v.* Griffin, 16 Geo. 141.] And where a line runs a part of the distance by a fixed monument, as, for example, by the side of a wharf, and to continue thence to another boundary, as, for example, low-water mark, it is to be run in the same direction. Dawes *v.* Prentice, 16 Pick. 435.

[A deed conveying a right to flow, gave the grantees a right to raise and keep up the water of their dam to the height of a hole drilled in a certain rock described in the deed.

gether with all the wastes. II. All the services, such as fealty, suit of court, rents, &c. III. All courts baron, courts leet, with

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There was no hole at the time at said point, and it was held that a hole drilled nineteen years afterwards, without notice to the grantor, by one of the grantees, who had in the mean time conveyed away his interest under the deed, and after a disagreement had arisen, respecting the right to flow, could not be treated as the monument referred to in the deed, although drilled at the place agreed on by the parties when the deed was made. White *v.* Bliss, 8 Cush. 510. See also, Smith *v.* The State, 3 Zabr. 712.]

III. If the *lines and courses of an adjoining tract* are called for, the lines will be extended to them, if they are sufficiently established, and no other departure from the deed is thereby required. [Hunt *v.* Francis, 5 Ind. (Porter,) 302.] And lines *actually marked* on the earth, will prevail over those which are only delineated on a plan, or not marked at all. Dogan *v.* Seekright, 4 Hen. & Munf. 125. As to *plan*, see Thomas *v.* Patten, 1 Shepl. 329; Heaton *v.* Hodges, 2 Shepl. 66; Bussey *v.* Grant, 7 Shepl. 281; [Lincoln *v.* Wilder, 29 Maine, (16 Shep.) 169; Dula *v.* McGee, 12 Ired. N. C. 332; Ganse *v.* Perkins, 2 Jones's Law R. (N. C.) 222; Evans *v.* Corley, 8 Rich. S. C. 315; Alton *v.* Illinois Transportation Co. 12 Ill. 38; Wolfe *v.* Scarborough, 2 Ohio, (N. S.) 361. And see Hazen *v.* Boston and Maine R. R. 2 Gray, 574. To make any plan a part of the description of a deed, it must be distinctly referred to therein as such. Talbot *v.* Copeland, 38 Maine, (3 Heath,) 341; Kenyon *v.* Nichols, 4 Rhode Island, 411.]

IV. In the absence of all the foregoing monuments, resort is had to the *courses and distances* given in the deed; the one or the other being preferred, accordingly as it may appear to have been regarded by the parties as the more material and controlling object. See Cherry *v.* Slade, 3 Murphy, 82; Blight *v.* Atwell, 4 J. J. Marsh. 279; Preston *v.* Bowmar, 6 Wheat. 582; Loring *v.* Norton, 8 Greenl. 61; 2 Flintoff on Real Prop. 537, 538; Nelson *v.* Hall, 1 McLean, 518; Wells *v.* Crompton, 3 Rob. Louis. R. 171; Machias *v.* Whitney, 4 Shepl. 343; [Spruill *v.* Davenport, Busbee, Law, (N. C.) 134; S. C. 1 Jones, Law, 203; Wynne *v.* Alexander, 7 Ired. (N. C.) 237; Ib. 310.]

The foregoing, however, are to be taken only as general rules, subject to a variety of exceptions, arising out of the nature and circumstances of the case. Bradford *v.* Pitts, 2 Rep. Const. C. 115. Such construction is always to be given as will satisfy, if possible, all the calls in the deed. Law *v.* Hempstead, 10 Conn. R. 23. But a boundary may be rejected, when it is manifest, from all the circumstances, that it was inadvertently inserted, and that a tract of land with different boundaries, was intended to be conveyed. Thatcher *v.* Howland, 2 Met. 41.

If the land is described as running *from* one monument *to* another, a straight line is conclusively presumed to have been intended. Allen *v.* Kingsbury, 16 Pick. 235; [Marsh *v.* Marshall, 19 N. H. 301; Slade *v.* Etheridge, 13 Ire. (N. C.) 353, 453.] And if the course given be "*northerly*" or "*southerly*," or the like, without referring to a monument or other means of certainty, it will be taken to mean *due north*, or south, &c. Brandt *v.* Ogden, 1 Johns. 156. [See Spruill *v.* Davenport, 1 Jones, Law, (N. C.) 203.] So, if the length of a line be given as being "*about*" so many rods or feet, and no monument be given, or the place of the monument given cannot be ascertained, the grant will be limited to the number of rods or feet mentioned. Cutts *v.* King, 5 Greenl. 482. [And where the line is described as running parallel with, and within a certain distance of a wall, but its length is not given, the line is to run as far as the grantor has a right to extend it, in order to give effect to the grant. Dall *v.* Brown, 5 Cush. 289.]

Where the other terms of the description are not sufficiently certain and demonstra-

the fines and perquisites annexed thereto, and all other franchises that are parcel of, or appendant to the manor, at the time of the conveyance. The site and demesnes of the manor may, however, be separated, in a lease, from the manor itself. (*a*)

35. Lands held in fee simple of a manor are not considered as parcel of the manor, although the rents and services issuing out of such lands, are parcel of the manor. But where lands, which originally constituted part of the demesnes of a manor, are granted out for life or in tail, the reversion remains parcel of the manor, and will pass by a conveyance of the manor. For, as Mr. Pigot observes, when a person is seised of a manor and demesnes in possession, and makes a lease for life, and parts with the possession of what he so leases, in lieu of the possession, he has the reversion and services which are annexed to the manor, and constitute a part of it; and the reversion and services naturally follow the right and nature of the land. (*b*)

36. A court baron being incident to a manor of common right, the manor cannot be granted by a private person, with an exception of the court baron and its perquisites, but may be so granted by the King. (*c*)

37. An advowson appendant to the manor will pass by a conveyance of the manor, even though the word "*appurtenances*" be omitted, because it is parcel of the manor. But things which are not parcel of the manor, will not pass by a conveyance of the manor, unless they have acquired from time immemorial a reputation of appendancy. (*d*)

38. It has been stated that, although many manors have been destroyed, yet they still continue to be called manors, though in fact they are only reputed manors; and a reputed manor will pass in a deed by the word "*manor*." (*e*)

*39. It is said, by Lord King, that a "*hundred*" is only a franchise, and that by the grant of a hundred, nothing but the franchise passes, and not the lands lying within the hundred. (*f*) *267

(*a*) 1 Inst. 5 a. Tit. 27. West Symb. P. 1, s. 389. Tanfield *v.* Rogers, tit. 28, c. 1, § 27.
(*b*) Pigot, Recov. 42.
(*c*) Acton's case, 3 Dyer, 288 b. Cro. Eliz. 792.
(*d*) Shep. Touch. 92.
(*e*) *Ante*, Dissert. c. 3.
(*f*) Bays *v.* Bird, 2 P. Wms. 397. 1 Vent. 403.

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tive, the *quantity* of land mentioned becomes an essential part of the description. Kirkland *v.* Way, 3 Rich. 4; [Pierce *v.* Faunce, 37 Maine, (2 Heath,) 67.]

40. The word "*messuage*" is *synonymous with* "*dwelling-house;*" and a grant of a messuage with the appurtenances, will not only pass a house, but all buildings attached or adjoining to it; as also its curtilage, garden, and orchard; together with the close in which the house is built. But if a greater quantity of land has been usually occupied with the house, yet it will not pass. (*a*) [1]

41. The word "*farm*" comprehends many things; for by the conveyance of a farm will pass a messuage, arable land, meadow, pasture, wood, &c., thereto belonging, or therewith used; because this word properly signifies a messuage, with a quantity of demesnes thereto belonging. (*b*)

(*a*) 1 Inst. 5 b. Smith *v.* Martin, 2 Saund. 400.
(*b*) 1 Inst. 5 a. Shep. Touch. 93.

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[1] By the grant of a "*mill*," *eo nomine*, no other land passes in fee, but the *site*, or land under the mill, and its overhanging projections, together with the dam, and other things annexed to the freehold, and essential to its beneficial enjoyment. But the term "*mill*" also includes, as appurtenant, the free use of the head of water, existing at the time of the conveyance, with the easement of the use of the mill-yard, and other easements and incidents then belonging to the grantor and used by him as appurtenant to the mill. Blake *v.* Clark, 6 Greenl. 436; Whitney *v.* Olney, 3 Mason, 280; Maddox *v.* Goddard, 3 Shepl. 218; Rackley *v.* Sprague, 5 Shepl. 281. So, of a conveyance of a "*mill privilege*," or "*site*," or "*the privilege of a mill*." [Forbush *v.* Lombard, 13 Met. 109;] Moore *v.* Fletcher, 4 Shepl. 63; Crosby *v.* Bradbury, 2 Applet. 61; 20 Maine R. 61, S. C.; Pickering *v.* Stapler, 5 S. & R. 107.

So, the conveyance of a "*dwelling-house*," or a "*cottage*," will pass the land under and the curtilage belonging to the same. 1 Inst. 4 a; Emerton *v.* Selby, 2 Ld. Raym. 1015; Whitney *v.* Olney, *supra*; Hilton *v.* Gilman, 3 Shepl. 263. But ordinarily, when *buildings* are conveyed, and are described as standing on a certain lot or parcel of land, it is, *primâ facie*, not the apparent intention to convey the land itself; and it is only the superstructure that passes. And though, by the rule above stated, the curtilage will pass by the conveyance of the dwelling-house upon it, yet if it is made apparent, by legal evidence, that such was not the actual intent of the parties, the building only will pass. Derby *v.* Jones, 14 Shepl. 357. As to the meaning and extent of the terms, "*woods*," "*farm*," "*land*," "*trees*," "*mines*," "*messuages*," &c., and what passes thereby, see 1 Inst. 4, 5; Shep. Touchst. 89–94.

So, the conveyance of a "*wharf and dock*," may pass not only the dock, and the land under the wharf, but also the *flats* in front of them. Doane *v.* Broad St. Assoc. 6 Mass. 332. And see *supra*, § 30, note. [A deed conveying a storehouse with the out-house and office adjoining, conveys also the lot on which the buildings are. Wise *v.* Wheeler, 6 Ired. (N. C.) 196. Where a well was conveyed by the terms "spring or well of water," it was held that the grantee owned the land, and that the conveyance included *ex vi termini*, not only the orifice which reached down to the water, but the whole opening in the earth before it was stoned, and the stone laid into the well, and the water therein, and that he had a right of way to and from the well. Mixer *v.* Reed, 25 Vt. (2 Deane,) 254.]

42. The word "*land*," strictly taken, only signifies arable land. For in the ancient *præcipes* we constantly find the words, *terra*, *pratum*, *et pastura;* land, meadow, and pasture. But this confined meaning of the word "*land*" was only adopted when used in a *præcipe*, in an adversary suit; for Lord Coke says, land, in the legal signification, comprehends any ground, soil, or earth whatever, as meadows, pastures, woods, moors, waters, marshes, furzes, heaths; and that it also includes all castles, houses, and other buildings thereon; which will pass with it. (*a*)[1]

43. Land is often described according to its *admeasurement;* and in that case, the acres shall be *taken according to the estimation of the country in which it lies;* not according to the statute *de terris mensurandis.* But where a person has a close containing twenty acres of land by estimation, but which in reality is not eighteen, and he grants ten acres of that close to another, the grantee shall have them according to statute measure; because those acres were not known by parcels, or by metes and bounds. (*b*)

44. Where a person has a movable estate of inheritance in thirteen acres of land, parcel of a meadow of eighty acres, he may convey it by the description of thirteen acres, lying within the meadow of eighty acres, without bounding or describing it in certainty. (*c*)

45. If a person grants to another "*the profit*" of certain lands, and makes livery of seisin *secundum formam chartæ*, the land * itself will pass, together with the vesture, herbage, * 268 trees, mines, and whatsoever is parcel of the land; for what is the land, but the profits thereof? (*d*)

46. If a man, seised of several acres of wood, grants to another *omnes boscos suos*, "*all his woods;*" not only the woods growing upon the land pass, but the land itself; for *boscos* not only includes the trees, but also the land whereupon they grow. (*e*)

47. If a man grants "*all his pastures*," the land employed in the feeding of beasts will pass; as also such pastures and feedings as the grantor has in another man's soil. And if a person

(*a*) 1 Inst. 4 a.
(*b*) Some *v.* Taylor, Cro. Eliz. 665. Morgan *v.* Tedcastle, Poph. 55.
(*c*) 1 Inst. 48 b. (*d*) 1 Inst. 4 b. (*e*) Idem.

[1] [Sudbury *v.* Jones, 8 Cush. 189.]

grants *omnia prata sua*, "*all his meadows*," the land itself of that kind will pass. (*a*)

48. Lord Coke says, a grant of *vesturam terræ* will not pass the soil; but only the corn, grass, and underwood. This has been doubted; and it has been contended, that the words "*vesture of lands*," mean all the profits. (*b*)

49. If a person grants *aquam suam*, the soil will not pass; but only the right of fishing in that water; for the proper words, in that case, to pass the soil, would be so many acres of land *aquâ coöpertas*, covered with water. But the word *stagnum*, or "*pool*," will pass both the water and the land. (*c*)

50. *Tithes* will not pass, under the denomination of land; and a release of all claims arising out of lands will not affect them; so that they only can be conveyed by the word "*tithes*."

51. The word "*tenement*" is of greater extent than any that has been mentioned; for though in its usual acceptation it is only applied to houses and other buildings; yet in its original, proper, and legal sense, it *signifies every thing that may be holden*, provided it be *of a permanent nature;* whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Thus, the words *liberum tenementum*, or frank tenement, are applicable, not only to land, but also to rents, commons, offices, and the like. (*d*)

52. The word "*hereditament*" is much the largest and most comprehensive one used in deeds; for it includes not only lands and tenements, but also whatever may be inherited; be it corporeal or incorporeal, real, personal, or mixed.[1] Thus, an *heirloom*, or *piece of furniture*, which by custom descends to the heir, together with a house, is neither land nor tenement, but a mere movable; yet being inheritable, it is comprised
269 * under * the general word hereditament. And so a *condi-*

(*a*) 1 Inst. 4 b. (*b*) Id. n. 1. (*c*) Idem. (*d*) 1 Inst. 6 a.

[1] But here also, as in other cases, the intention is to be regarded. Therefore, where one conveyed by deed *all his lands, tenements, and hereditaments* situated in the Province of New Brunswick, *of which he was seised in fee, or of any other estate of freehold or inheritance*, and had certain premises as mortgagee, as well as other lands in fee, but did not assign the mortgage-debt; it was held, that the mortgaged lands did not pass, under the word "*hereditaments*." Doe *v.* Donelly, 3 Kerr, N. Brunsw. Rep. 238.

tion, the benefit of which may descend to a person from his ancestor, is also an hereditament. (*a*)

53. Notwithstanding the maxim, *cujus est solum*, &c., a lease of "*a yard*" will not pass a cellar situate under that yard; if it can be shown by evidence that the cellar was not intended to be demised. (*b*)

54. The words, "*all lands and meadows to the said messuage or mill belonging, or used, occupied, or enjoyed, or deemed, taken, or accepted as part thereof*," inserted in a release, have been held to pass leasehold, as well as freehold lands. (*c*)

55. In consequence of the maxim, *id certum est quod certum reddi potest*, lands will pass in a deed by the words, "*all that the estate in the tenure of J. S.*, or "*all that estate which descended to the grantor from J. S.*, or "*all the grantor's lands in the county of B.*" And it is very common, after a particular description of the estates intended to be granted, to insert the words *and all other the messuages, &c., of the said A. B., in the county of C.*" (*d*)

56. Lord Bacon says, *veritas nominis tollit errorem demonstrationis.* Therefore, if lands are *described in the first instance, by their proper names*, as the manor of Dale; or by their abuttals, as, a close of pasture bounded on the east by Endsdenwood, on the south by, &c.; or, if the general boundary is mentioned, and the grantor has no other lands in the same precinct; or if the lands are described by their appendancy to other lands more notorious, as parcel of the manor of A.; in all these cases, if there be *an error in any addition made to these names or descriptions, it will have no effect.* (*e*)

57. Thus if a person grants his close called Dale, in the parish of Hurst, in the county of Hants, and the parish extends into the county of Berks, and the whole close of Dale lies in the county of Berks; yet because the parcel is specially named, the falsity or the addition hurteth not. (*f*)

58. In a case reported by Plowden, where a lease was made of all that the farm of Brosley, then in the tenure and occupation of R. Wilcox, which was not the fact; the Court said, that the word farm had a certainty in itself; and when the description

(*a*) 1 Inst. 6 a. Fearne, Posthum. 8. 3 Atk. 82.
(*b*) Tit. 1. Doe *v.* Burt, 1 Term R. 701.
(*c*) Doe *v.* Williams, 1 H. Black. 25. (*d*) Shep. Touch. 250.
(*e*) Bac. Tracts, 102. (*f*) Id. 105. Windham *v.* Windham, 3 Dyer, 376 b.

went further, and said, in the tenure and occupation of R. Wilcox, this was of no effect; for if it was not in his tenure and occupation, yet it should pass; because there was a certainty 270* in *the thing demised, viz. the farm of Brosley; and so another certainty put to a thing which was certain enough before, was of no manner of effect. (*a*)

59. But if there be *an error in the principal description* of the thing intended to be granted, though there be no error in the addition, nothing will pass. Thus, Lord Bacon says, if a person grants *tenementum suum*, or *omnia tenementa sua*, in the parish of St. B., without Aldgate, where in truth it is without Bishopsgate, *in tenurâ Gulielmi A.*, which is true, yet the grant will be void; because that which sounds in denomination is false, which is the more worthy; and that which sounds in addition is true, which is the less. And though the words, *in tenurâ Gulielmi A.*, which is true, had been first placed, yet it had been all one. (*b*)

60. Where *words of addition are mistaken*, and *contrary to the real fact*, they will not even operate as a restriction on the preceding words.[1]

61. A corporation demised in these words,—"all that their glebe land lying in Chesterton, viz.: seventy-eight acres of land, and also the demesnes of the said seventy-eight acres, with all the tithes of the said parish of Chesterton, and also the tithes of the said seventy-eight acres; *all which lately were in the occupation of Margaret Peto, deceased.*" The tithes of the lands demised never were in the occupation of Margaret Peto; and the question was, whether they passed to the lessee. It was urged for the plaintiff, that the words, "*in the occupation of M. Peto,*" were a clause of restriction, which showed an intent that nothing should pass but what was in her occupation. But all the Judges held the lease good, and no restriction of the first words, because there were three distinct clauses before. I. The grant of the seventy-eight acres of glebe. II. The grant of the tithes. III. The grant of the tithes of the seventy-eight acres of glebe;

(*a*) Wrotesley *v.* Adams, Plowd. 191.
(*b*) Bac. Tra. 105. Dowtie's case, 3 Rep. 9. Hob. 171.

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[1] See *supra*, § 31, note.

which were all distinct several clauses by themselves. And the clause, all which, &c., did not depend on any of them; for the words, "*which were*, &c.," was a restriction, only when the clause was general, and was all but one and the same sentence; and not ended or certain before the end of the sentence. But where the clause was not in one entire sentence, but distinct and disjoined from the other, as here it was, there could not be any restriction. Also, this being in the case of a common person, addition of a false thing, viz.: false possession, shall never hurt * the grant; for the addition of a falsity shall never *271 hurt, where there is any manner of certainty before. Wherefore they all concluded, that the grant was good; and observed, that though the words "*which were in the tenure of M. P.*" when they are in one and the same sentence, may be construed to be a restriction; yet in these words, "*all which were*," &c., the word "*all*," so disjoined, could not be a restriction, but an explanation. (*a*)

62. Where the lands are *first described generally*, and *afterwards a particular description is added*, that shall *restrain the general words*.[1] Thus, if a man grants all his lands in D. which

(*a*) Swift *v.* Eyres, Cro. Car. 546.

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[1] This agrees with the rule cited *supra*, ch. 20, § 15, note :—*Verba generalia restringantur ad habilitatem rei vel personæ.* Bac. Max. Reg. 10, p. 43; also expounded in Broom's Legal Maxims, p. 275.

In the spirit of this rule, it is held, that general words in a deed are not to be limited by the addition of words of restriction, where the latter words do not clearly indicate the intention, and designate the thing granted; Field *v.* Huston, 8 Shepl. 69; much less will the general words be restrained by the particular recital, when it appears that such recital was intended and used only by way of reiteration and affirmation of the preceding general words. Moore *v.* Griffin, 9 Shepl. 350. Thus, in Field *v.* Huston, where one, claiming and possessing several adjoining tracts of land, containing together about 280 acres, conveyed "*a certain tract or parcel of land in F., containing 230 acres more or less, all the lands I own in said town, the butts and bounds may be found in the county records at P.;*" and it appeared by the records that he owned several adjoining tracts, containing in the whole 235 acres; but he in fact possessed and claimed another adjoining tract, to which he had no apparent title on record, nor any other than a possessory title; it was held that this last-mentioned tract also passed by the deed. And in Moore *v.* Griffin, where the conveyance was of "one half of a tract of land, formerly the estate of H. W., deceased, to wit, that part next to and adjoining Harrisicket *River*, said tract beginning at a large *rock*, by Little River, thence north 45 degrees west to Harrisicket River, and bounded round *by the shore* to said *rock;*" and then proceeding to describe the line dividing the tract longitudinally into two parts, (it being a neck of

he has by the gift and feoffment of J. S., nothing will pass but lands of the gift and feoffment of J. S. But if he had granted all his lands in D. called N., which was the estate of J. S., there the lands called N. shall pass, though they never were the estate of J. S. (*a*)

63. The next clause, usually inserted in the premises of a deed, where the fee simple is conveyed, is, "*Together with all deeds, evidences, and writings, &c., relating to the premises conveyed,*" &c.[1] For although, in general, deeds follow the land, and a purchaser in fee, without warranty, is entitled to them, though not particularly granted, yet it is not amiss to insert this clause; and in conveyances to uses it ought never to be omitted, because, in that case, it has been questioned whether the deeds would not pass to the releasees to uses, and not to the *cestui que use.* (*b*)

64. In Lord Buckhurst's case it was resolved, that if a person made a feoffment with warranty, by which he was bound to render in value, there, without an express grant, the feoffee should not have the charters that comprehended warranty, upon which the feoffor might have his warranty paramount. (*c*)

65. The next clause, in the premises of a deed is that whereby the grantor *excepts* something out of that which he has before

(*a*) Bro. Ab. Grants, 92. (Doe *v.* Donelly, 3 Kerr, 238.)
(*b*) 1 Inst. 6 a, n. 4. 1 Saund. 112. *Vide supra*, p. 117, s. 19.
(*c*) 1 Rep. 1. *Infra*, c. 25.

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land lying between the mouths of those two rivers,) as a line extending from the middle of said northwest line, "to *an oak* by the shore;"—it was held, that notwithstanding the particular reference to the rock and the oak tree, yet, as they were not mentioned with any apparent intention of restricting the grant, the grantee was entitled to hold to the *river*, including the flats or shore.

So, it is laid down by Lord Hobart, in Stukeley *v.* Butler, Hob. 168, that where the premises of a grant are special and express, they cannot be restrained or frustrated by a distinct clause of the instrument; though it is otherwise, where the premises are general and implied. And see Cutler *v.* Tufts, 3 Pick. 272, 278, where this doctrine is commented upon and confirmed. Hibbard *v.* Hurlburt, 10 Verm. 173; Mayo *v.* Blount, 1 Ired. 283; Smith *v.* Strong, 14 Pick. 128; Barnard *v.* Martin, 5 N. Hamp. 536; Weems *v.* McCaughan, 7 S. & M. 422.

[1] This clause is not usually inserted in American deeds of conveyance, for the reason stated *supra*, ch. 11, § 19, note, and *ante*, tit. 2, § 39, note. The English doctrine is limited and explained in Goode *v.* Burton, 11 Jur. 851. [Upon a conveyance without warranty, all deeds, warranties, covenants, and other muniments of title, belong to the grantee as appurtenant and incident to the land granted. Redwine *v.* Brown, 10 Geo. 311.]

granted, by which means it does not pass by the grant; and is severed from the things granted. (*a*) [1]

(*a*) Shep. Touch. 77.

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[1] The difference between an *exception* and a *reservation*, is thus stated by Sheppard: "A *reservation* is a clause of a deed, whereby the feoffor, &c., doth reserve some *new* thing to himself, out of that which he granted before. This doth differ from an *exception*; which is ever of part of the thing granted, and, of a thing *in esse* at the time; but this is of a thing newly created or reserved out of a thing demised, that was not *in esse* before." Shep. Touchst. 80. An incident to a grant may be the subject of a reservation. Thus, where one granted his land, reserving the streams of water and the soil under them, with the right of erecting mill-dams, and all such parts of the land as should be overflowed with water, for the use of mills for the grantor; it was held good as a reservation, though, considered strictly as an exception, it was void for uncertainty; and that as a reservation, it was inoperative, until the grantor exercised his right by erecting mill-dams, &c. Thompson *v.* Gregory, 4 Johns. 81; and see Provost *v.* Calder, 2 Wend. 517; 4 Kent, Comm. 468; 1 Inst. 47 a; Bract. lib. 2, c. 15, § 2, fol. 32 b; Case *v.* Haight, 3 Wend. 632; Jackson *v.* McKinney, Ib. 233; Cutler *v.* Tufts, 3 Pick. 272; [Craig *v.* Wells, 1 Kernan, (N. Y.) 315; Maynard *v.* Maynard, 4 Edw. Ch. 711; Butcher *v.* Creel, 9 Gratt. (Va.) 201.

In Massachusetts, a right of way may be created by a reservation or exception in the deed of the grantor, reserving or retaining to himself and his heirs a right of way, either in gross, or as annexed to lands owned by him, so as to charge the lands granted with such easement and servitude, as well as by a deed from the owner of the land to be charged, granting such way. Bower *v.* Conner, 6 Cush. 137; Wendell *v.* Delano, 7 Met. 176.

The grantor of a water privilege made this reservation of the water, "except in times of low water when it is wanted for the carding, and cloth-dressing, and grist-mill." Held that this reservation was valid, and that it must be regarded as a certain measure of water, rather than water for any particular use. Rood *v.* Johnson, 26 Vt. (3 Deane,) 64.]

Where a mill-site, falls, and privileges were conveyed, "exclusive of the grist-mill now on said falls, with the right of maintaining the same;" it was held that this reservation included only the mill edifice, and not the fee of the land. Howard *v.* Wadsworth, 3 Greenl. 471. So, where land is conveyed, reserving the buildings. Sanborn *v.* Hoyt, 11 Shepl. 118; [Forbush *v.* Lombard, 13 Met. 109; Curtis *v.* Gardner, Ib. 457.]

Where land is conveyed in general terms, an exception of any specific portion or quantity is valid, and not repugnant. Sprague *v.* Snow, 4 Pick. 54; Cutler *v.* Tufts, 3 Pick. 272; [Gaveny *v.* Hinton, 2 Greene, (Iowa,) 344. Where land was conveyed, and after the description thereof, and before the *habendum*, were inserted the words, "the said land is to be common and unoccupied," it was held that these words would take effect as a valid reservation. Gay *v.* Walker, 36 Maine, (1 Heath,) 54. The words, "subject to the widow M. M.'s dower, which has been set off," in a deed, are sufficient to except out of the grant the land so set off. Meserve *v.* Meserve, 19 N. H. 240. Where a tenant in fee erects a mill with a dam and race to supply the same, and afterwards conveys that part of his land whereon are the dam and race, without any express reservation as to them in his deed, his grantee takes the land burdened with an easement in favor of the grantor, which the grantee cannot disturb. Seibert *v.* Levan, 8 Barr. 383.]

66. The following circumstances are necessary to make a *good exception*:—I. It must be made by *apt words.* II. The thing excepted must be *part of the thing previously granted*, and not of any other thing. III. It must *only be a part of the thing granted;* for if the exception extends to the whole, it will be void. IV. It must be of such a thing as is *severable from the thing granted;* and not an inseparable interest, or inci-
272* dent. *V. It must be such a thing as that *he who excepts may retain* it. VI. It must be of *a particular thing out of a general one;* not a particular thing out of a particular one. VII. It must be *certainly described* and set down. (*a*)

67. With respect to the *habendum*, its office is only *to limit the certainty of the estate granted;*[1] therefore no person can take an immediate estate by the *habendum* of a deed, who is not named in the premises; for it is in the premises of a deed, that the thing is really granted. (*b*)

68. If land be given to J. S., *habendum, to him and a stranger*, for a certain estate; this is *void as to the stranger*, because he was not mentioned in the premises; and when J. S. dies, there will be no occupancy; for the grant to the stranger in the *habendum* was intended an estate to him, and not as a limitation of the estate of J. S. (*c*)

69. There are, however, *some exceptions to this rule.* I. If lands are given in *frank marriage*, the wife, who is the object of the gift, may take by the *habendum*, though not named in the premises. II. A person not named in the premises may take an estate *in remainder* by the *habendum.* III. *If no name whatever*

(*a*) Shep. Touch. 77. (*b*) 2 Rep. 55 a. (Manning *v.* Smith, 6 Conn. 289.)
(*c*) Brookes *v.* Brookes, 2 Roll. Ab. 67. Windsmore *v.* Hobart, (Hob. 318, and note by Williams. Stukeley *v.* Butler, Hob. 168, 171. Jackson *v.* Ireland, 3 Wend. 99.)

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[1] But it may sometimes enlarge or diminish the previous words of grant, when the intention so to do is clearly apparent. Sumner *v.* Williams, 8 Mass. 162. Where a deed of conveyance to three persons recited a will, in which the same premises were devised to one of them for life, remainder to the others in fee, and the deed granted the premises to the three in fee *habendum* "to them, their heirs and assigns in the manner mentioned in said will;" it was held, that the *habendum* controlled the premises. Jackson *v.* Ireland, 3 Wend. 99. [So a deed "demising, granting, and farm letting" the land to B and her husband, their heirs, executors, administrators, and assigns, *habendum* during their natural lives, was held to convey a life-estate only, such appearing to be the intent of the parties. Higgins *v.* Wasgutt, 34 Maine, (4 Red.) 305.]

be mentioned in the premises, then a person named in the *habendum* may take. (*a*)

70. There is a case where the two Chief Justices and the Chief Baron certified to the Chancellor that a lease was good, though the lessee was only named in the *habendum*. (*b*)

71. In declarations of uses, *a use may be declared in the habendum, to a person to whom no estate is granted in the premises.*

72. Sir T. B., by indenture between him and John and Geo. Sammes, bargained, sold, and enfeoffed to John Sammes, to hold to the said John and George Sammes, their heirs and assigns, to the use of them and their heirs forever. Resolved, that although the feoffment was good only to John and his heirs, yet the use limited to John and George and their heirs, was good; because the seisin of John was sufficient to serve the use declared to George. (*c*)

73. *Nothing can be limited in the habendum of a deed, which has not been given in the premises;* because the premises being the part of a deed in which the thing is granted, it follows that * the *habendum*, which is only used for the * 273 purpose of limiting the certainty of the estate, cannot increase the gift; for in that case the grantee would in fact take a thing which was never given to him. (*d*)

74. Thus if a person grants a manor, *habendum una cum* another manor, or *una cum advocatione* of another manor, this is not good; because it was not included in the premises. But if a thing is comprehended in the premises, and has *another name* in the *habendum*, the *habendum* is good; as if the nomination of an avowson is granted, *habendum* the avowson, it is good, though it varies in name; for it is one and the same thing. (*e*)

75. Where the *habendum* is *repugnant and contradictory to the premises*, it is *void;* and the grantee will take the estate given in the premises. This is a consequence of the rule already stated, that deeds shall be construed most strongly against the

(*a*) 1 Inst. 21 a. *Ante*, c. 2, s. 3. (1 Inst. 231 a.)
(*b*) 1 Inst. 7 a, n. 3.
(*c*) Sammes' case, 13 Rep. 55. (Spyve *v.* Topham, 3 East, 115.)
(*d*) 2 Roll. Ab. 65. Shep. Touch. 76.
(*e*) 2 Roll. Ab. 65. Plowd. 157.

grantor; therefore he shall not be allowed to contradict or retract, by any subsequent words, the gift or grant made in the premises. (*a*)[1]

76. Thus, if lands are given in the premises of a deed to A and his heirs, *habendum* to A, for life; the *habendum* is void; because it is utterly repugnant to, and irreconcilable with the premises. So if the grant were to two persons, *habendum* to the one for life, remainder to the other life, it would be void; because by the premises the grantees were joint tenants; so the *habendum* would sever the jointure, and make the one to have the whole during his life, and the other to have the whole after him. (*b*)

77. In the case of things which derive their effect from the delivery of the deed, without other ceremony, and which lie in grant; there the *habendum*, if repugnant to the premises, is void; as if a man grants rent or common out of his land, in the premises of a deed, to one and his heirs, *habendum* to the grantee for years or for life, the *habendum* is repugnant and void; for an estate in fee passed in the premises, by the delivery of the deed. But where a ceremony is requisite to the perfection of the estate limited by the premises, and nothing more than the mere delivery of the deed is required to the perfection of the estate limited by the *habendum*, there, although the *habendum* be of a
274* *lesser estate than is mentioned in the premises, if the ceremony is not performed, it shall stand. (*c*)

78. A person by indenture covenanted, granted, and demised, and to farm let, certain lands to A. B. and A her son, and to the heirs of the said A; *habendum* to them from the date of the same indenture until the end of ninety-nine years; no livery of seisin was made. It was resolved, that as livery of seisin was necessary to perfect the estate limited in fee, nothing would have passed but an estate at will, if the deed had not gone further; but as an estate for years was limited in the *habendum*, that was good presently, by the delivery of the deed. And so it appeared

(*a*) *Ante*, c. 20, § 13, 25. 1 Inst. 299 a. 8 Rep. 56 b. (Jackson *v.* Ireland, 3 Wend. 99.)
(*b*) Plowd. 158. (But see *ante*, tit. 18, ch. 1, § 2, note.)
(*c*) 2 Rep. 23 b.

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[1] [Where a deed conveying property, prohibits the use of it in conformity with the title conveyed, the prohibition is void. Craig *v.* Wells, 1 Kernan, (N. Y.) 315.]

to have been the intention of the parties that the deed should take effect by the delivery. (*a*)

79. There are, however, *several cases* where the *habendum* is *allowed to* abridge, or rather *qualify the premises.* For we have seen that where a deed first speaks in general words, and afterwards descends to special ones, if the special words agree with the general ones, the deed shall be intended according to the special ones. (*b*)[1]

80. Thus, where *no estate is limited in the premises*, and an express *estate for years is limited in the habendum*, this will qualify and abridge the general intendment of the premises, by which an estate for life would otherwise have passed. (*c*)

81. If lands are given in the premises to A and to *his heirs*, *habendum* to him and the *heirs of his body*, he will only take an estate tail; because the *habendum* may qualify and restrain the general import of the word "*heirs.*" (*d*)

82. Where lands were granted to A and *his heirs*, *habendum* to him and *his heirs for three lives;* the *habendum* was construed so as to abridge the estate given in the premises, to an estate for three lives. (*e*)

83. If a lease be made to *two persons*, *habendum* the one *moiety to the one*, and the other *moiety to the other*, the *habendum* makes them *tenants in common;* whereas by the premises they were joint tenants. (*f*)

84. *The estate given in the premises may be enlarged by the habendum;* thus, where an estate is given in the *premises* to the grantee *for life*, *habendum* to him and *his heirs*, the grantee will take an *estate in fee.* (*g*)

*85. Where the *premises* and the *habendum* of a deed *275 are *equally clear*, the former will not be controlled by the latter, but both will be allowed to operate; it being a rule, that a

(*a*) Baldwin's case, 2 Rep. 23.
(*b*) 8 Rep. 154 b. *Ante*, c. 20, § 15.
(*c*) 1 Inst. 183 a. 2 Rep. 55 a.
(*d*) 8 Rep. 154 b. Thurman's case, 2 Roll. Ab. 68.
(*e*) Pilsworth *v.* Pyett, T. Jones, 4.
(*f*) 1 Inst. 183 b, 190 b.
(*g*) 1 Inst. 299 a.

[1] The *habendum*, as well as the covenants, in a deed, may well be taken into consideration, in ascertaining the intent of the parties, where it is otherwise obscure. Deering *v.* Long Wharf, 12 Shepl. 51.

deed shall be construed in such a manner as that every part may be effectual, if they can stand together. (*a*)

86. Thus, if lands are given in the premises to a person and the heirs of his body, *habendum* to him and his heirs, he will take an estate tail, with a fee simple expectant. (*b*)

87. Lands were given to husband and wife, and to their heirs, *habendum* to them and the heirs of their bodies. It was held, that the grantees took an estate tail, with a fee simple expectant. Mr. Hargrave has observed, that this case was attended with circumstances particularly showing an intention to pass both; for there was a reservation of tenure to the lord paramount, which could not be, if only an estate tail passed to the donee, and the reversion had remained in the donor, for then the tenure must have been of the donor. (*c*)

88. The words inserted in the *habendum*, for the purpose of showing the quantity of estate intended to be given, are called *words of limitation*, in contradistinction to the words in the *premises*, by which the lands are given, and which are called *words of purchase*. Thus Mr. Fearne says—"In general, words of purchase are those by which, taken absolutely, without reference to or connection with any other words, the estate first attaches, or is considered as commencing in the person described by them: whilst words of limitation operate by reference to or connection with other words, and extend or modify the estate given by those other words. (*d*)

89. Mr. Fearne had previously observed, that "when the word '*heirs*,' &c., operates only to expand an estate in the ancestor, so as to let the heirs described into its extent, and entitle them to take derivatively, through or from him, as the root of succession, or person in whom the estate is considered as commencing, they are properly words of limitation. But when they operate only to give the estate imported by them to the heirs described, originally, and as the persons in whom that estate is considered as commencing, and not derivatively from or through the ancestor, they are properly words of purchase." (*e*)

90. In some cases, the same words operate as words

(*a*) *Ante*, c. 20.
(*b*) 8 Rep. 154 b. 1 Inst. 21 a.
(*c*) Turnman *v.* Cooper, Cro. Jac. 476. Tit. 2, c. 1.
(*d*) Fearne, Cont. Rem. 79, 8th edit.
(*e*) Idem, 107.

of purchase, *and also as words of limitation. Thus, *275 Lord Coke says, where a remainder is limited to the right heirs of B., it need not be said, "*and to their heirs;*" for being plurally limited, it includes a fee simple; and yet it rests but in one by purchase. (*a*)

So, where an estate is limited to the heirs male of the body of A, the eldest son of A takes by purchase, and his male issue by descent. (*b*)

(*a*) 1 Inst. 10 a.

(*b*) *Infra*, c. 22.

CHAP. XXII.

CONSTRUCTION.—BY WHAT WORDS DIFFERENT ESTATES MAY BE CREATED.

SECT. 1. *What Words create an Estate in Fee.*
11. *What Words create an Estate Tail.*
12. *What Words restrain the word Heirs.*
22. *Limitation to A and his Heirs, with a remainder over.*
26. *Limitation to a Man and his Wife, and the Heirs of their bodies.*
30. *Distinction between Heirs of the body, and upon or on the body.*
SECT. 33. *Limitation to the Heirs of the body of A.*
37. *Usual Mode of limiting Estates Tail.*
39. *What Words create an Estate for Life.*
41. *What Words create an Estate for Years, or at Will.*
43. *What Words create a Joint Tenancy.*
50. *What Words create a Tenancy in Common.*
59. *What Words create Cross Remainders.*
66. *Cases of Marriage Articles.*

SECTION 1. With respect to the words required to create an estate in *fee simple*, it is laid down by Littleton and Lord Coke, that in all feoffments and grants, the word "*heirs*" is absolutely necessary for that purpose, and cannot be supplied by any other word whatever.[1] Mr. Madox, however, contends that this doc-

[1] This rule of the common law is still in force in the United States, except where it has been changed by the statutes. Thus, in *New York*, words of inheritance are no longer necessary to create an estate in fee; but every deed passes to the grantee all the estate of the grantor in the premises, unless an intent to create a less estate is either expressed or *necessarily* implied in the deed. N. York, Rev. St. Vol. II. p. 33, § 1. The law is the same in *Missouri*. Rev. St. 1845, ch. 32, § 2. In the statutes of *Georgia*, *Arkansas*, and *Alabama*, provisions substantially similar are found, though somewhat differently expressed; it being enacted, that every conveyance, in which no other estate shall be *expressly limited*, shall be deemed a conveyance in fee simple. See Georgia, Rev. St. 1845, p. 409, § 32; Ark. Rev. St. 1837, ch. 31, § 3; Ala. Rev. St. 1823, tit. 18, ch. 5, § 5, by Toulmin. The same law is found in the codes of *Virginia*, *Kentucky*,

trine is not so ancient as is generally supposed; for that formerly there were several modes of expression by which an estate in fee simple might have been created, without the word "*heirs;*" such as to the feoffee *et suis*, or *suis post ipsum*, or *habendum et jure hæreditario perpetuo possidendum;* so that it is probable this maxim was not fully established till the principles of the feudal law were generally adopted; in which it was a rule, that in a donation of a feud, the words should be strictly technical. (*a*)

2. In Bracton's time, the form of a gift in fee simple was, *habendum tali hæredibus suis*, or *tali et hæredibus suis, vel cui terram illam dare vel assignare voluerit;* and it may now be laid *down as a general rule, that in all feoffments *.278 and grants to natural persons, and also in all conveyances deriving their effect from the Statute of Uses, *no word but the word* "*heirs,*" however strong the intention may appear to give the entire property, *will create an estate in fee simple;* nor is there in fact any other word in the English language, expressive of all the circumstances which constitute the idea of an heir. (*b*)

3. A gift to a man *et hæredibus*, with livery of seisin, though the word *suis* be omitted, will pass an estate in fee simple; because the livery shall be taken most strongly against the feoffor. But if one gives land to two persons, to hold to those two, *et hæredibus*, omitting *suis*, they only take an estate for life for the uncertainty. (*c*)

4. Lord Coke says, if lands are given to a man and "*his heir,*" in the singular number, he will not take an estate in fee. But Mr. Hargrave observes, that according to many authorities, the

(*a*) Lit. s. I. 1 Inst. 8 b. Form. Angl. Dissert. 1 Inst. 23 b. 2 Inst. 336.
(*b*) Bract. 17 b. (*c*) 1 Inst. 8 b. Plowd. 28.

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and *Mississippi;* but with a broader exception, namely, unless a less estate be limited *either* expressly, or by construction and operation of law. Tate's Dig. p. 174, § 27; Ky. Rev. St. 1834, Vol. I. p. 443; Mississippi, Rev. St. 1840, ch. 34, § 23. The statute of Virginia, has been interpreted "as meaning simply to dispense with words of inheritance, and transferring the fee, in those cases where before, for want of such words, an estate for life only would pass;"—but not "to break up, from their foundation, the ancient and general rules of construction; and convert those into words of purchase, which, for centuries, had been settled as words of limitation." Ball *v.* Payne, 6 Rand. 73, 77. And see Bramble *v.* Billups, 4 Leigh, 90; Doe *v.* Craigen, 8 Leigh, 449; 4 Kent, Comm. p. 8.

word "*heir*" may be *nomen collectivum;* and operate in the same manner as "*heirs*," in the plural number. (*a*)

5. It was determined in a modern case, that the words "*to the use of all and every the child or children of a marriage, equally share and share alike; if more than one, as tenants in common and not as joint tenants; and if but one child, then to such only child, his or her heirs or assigns forever;*" should be construed so as to create an estate in fee in all the children. The words "*his or her heirs*" being allowed to operate as words of limitation on all the preceding words in the sentence. (*b*)

6. *The rule* that the word "*heirs*" is absolutely necessary to create an estate in fee simple, admits of a *few exceptions.*[1] Thus, if a *father enfeoffs his son*, to hold to him and his heirs, and the *son reënfeoffs the father*, "*as fully as the father enfeoffed him*," an estate in fee simple will pass to the father. (*c*)

7. If *one coparcener* or *joint tenant releases* "*all his right*" to another, it will pass a fee without the word "*heirs.*" So if one coparcener grants *a rent* to the other, *for equality of partition*, an estate in fee simple in the rent will pass, without the word "*heirs;*" for as the rent comes in lieu of the inheritance, it has as strong a relation to the inheritance as if the word "*heirs*" had been mentioned. (*d*)

8. In releases that enure by way of *mitter le droit*, the
279* word *"*heirs*" is not necessary to create a fee simple, as has been already stated. (*e*)

9. In *conveyance to corporations*, whether sole or aggregate, the word "*heirs*" is *not necessary to create a fee simple.* But the law makes a distinction between a corporation aggregate and a sole corporation; for a feoffment to a corporation aggregate will pass a fee, without any words of limitation; whereas

(*a*) 1 Inst. 8 b, n. 4. 1 Roll. Ab. 832. (*Supra*, ch. 21, § 18. *Infra*, c. 23, § 29, 30.)
(*b*) Doe *v.* Martin, 4 Term Rep. 39.
(*c*) 1 Inst. 9 b, n. 6. (Gould *v.* Lamb, 11 Met. 84.) (*d*) Idem, Id. 10 a.
(*e*) *Ante*, c. 6.

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[1] It has been held in *Vermont*, that a lease, to continue for the full term of a thousand years, or "as long as wood grows or water runs," conveys an estate in fee. Arms *v.* Burt, 1 Verm. 306; Stevens *v.* Dewing, 2 Verm. 411. But see Foster *v.* Joice, 3 Wash. 498, where it seems to have been conceded in argument, that a deed to J. M., (an Indian,) "and his generation, to endure as long as the waters of the Delaware shall run," conveyed only a life estate. *Sed quære.*

in a feoffment to a *corporation sole, the word "successors" is necessary.* (*a*)

10. An estate in fee will pass *to the King* without the words heirs or successors; partly on account of his prerogative, and partly because, in judgment of law, the King never dies. (*b*)

11. With respect to the words that are necessary to create an *estate tail* in a deed, it is said, by Lord Coke, that the word "*heirs*" is as necessary for this purpose, as in the creation of an estate in fee simple; for as every estate tail was a fee simple at common law, and as no fee simple could be created without the word *heirs*, it followed that an estate tail could not be created without that word. Therefore, if lands are given to a person, *et semini suo*, or *exitibus vel prolibus de corpore suo*, to a man and his seed, or to the issues, or children of his body, he has but an estate for life. For, although the Statute *De Donis* provides that the will of the donor shall be preserved, yet that will and intent must agree with the rules of law. And it has been long settled that the word "*issue*" cannot operate, in a deed, as a word of limitation, so as to create an estate tail. (*c*)

12. No technical words, however, are required to restrain the general import of the word "*heirs*" to the *lineal descendants* of the grantee; therefore, any words that show such an intention, will be sufficient. Thus, Lord Coke says, if lands be given to B *et hæredibus quos idem B de primâ uxore suâ legitime procrearet*, this is a good estate in special tail, although B has no wife at the time, without the words *de corpore*. So it was if lands were given to a man and to his heirs, which he should beget of his wife; or to a man *et hæredibus de carne suâ*, or *et hæredibus de se*; in all these cases an estate tail was created, though the words *de corpore* were omitted. (*d*)

13. Lord Coke also says, the word *engendrès*, or begotten, may be omitted; and if the word be *procreandis*, or *quos procreaverit*, the estate tail is good; and as the word *procreatis* shall extend to the issue begotten afterwards, so *procreandis* shall *extend to the issue begotten before. Lord Hale has observed on this passage, that, where the words were *in* *280

(*a*) 1 Inst. 9 b.

(*b*) 1 Inst. 9 b.

(*c*) 1 Inst. 20 a. Nevell *v.* Nevell, 1 Roll. Ab. 837. Makepiece *v.* Fletcher, 2 Com. R. 457. 4 Ves. 794. Wheeler *v.* Duke, 1 Crom. & Mee. 210.

(*d*) 1 Inst. 20 b.

posterum procreandis, sons born before shall be excluded, on account of the peculiar force of the words *in posterum.* But Lord Talbot has held that, where lands were limited in a deed to C. H. for life, "*and after his decease, to the heirs male of his body thereafter to be begotten;*" the words, "thereafter to be begotten," did not confine it to the issue born after, but would likewise take in issue born before. (*a*)

14. Littleton says, if a man has issue, and dies, and land is given to the son, "*and to the heirs of the body of his father begotten,*" this is a good entail, though the father was dead at the time of the gift. Lord Coke has observed on this passage, that the words, "*the heirs,*" were observable; for if the words had been *his heirs*, it would have altered the case. Therefore, if lands were given to the son, and to his heirs of the body of his father, the son could not take as heir of the body of his father, because the grant was to him and to his heirs, &c. But if there were grandfather, father, and son, and the father died, and lands were given to the son, and to the heirs of the body of the grandfather, this would be a good estate tail in the son. (*b*)

15. The word "*heir,*" in the singular number, may in a special case create an estate tail. Thus, where lands were given to a man and his wife, and to one heir of their bodies lawfully begotten, and to one heir of the body of that heir only, it was held an estate tail. (*c*)

16. It has been stated that, where lands are given in the premises of a deed to A *and his heirs, habendum* to him *and the heirs of his body*, he will only take an estate tail. And Lord Coke says, if lands are given to B and his heirs, if B have heirs of his body, and if he die without heirs, that it shall revert to the donor, this is an estate tail. (*d*)

17. It has also been stated, that where a person, in the premises of a deed, gives lands to another and the *heirs of his body, habendum to him and his heirs forever*, he will take an estate tail with a fee simple expectant; but if it be added that, if he dies without heirs of his body, the lands shall revert to the donor, it will be an estate tail. (*e*)

(*a*) *Idem*, and n. 3. Id. 26 b, n. 1. Canon's case, 3 Leon. 5. Hebblethwaite *v.* Cartwright, Forrest, 30.

(*b*) Lit. s. 30.

(*c*) 1 Inst. 20 a and b, 22 a.

(*d*) *Ante*, c. 21. 1 Inst. 121 a.

(*e*) *Ante*, c. 21, s. 86. 1 Inst. 21 a.

18. Littleton says, if lands are given to a man and his heirs males, or to a man and his heirs females, the donee will take an * estate in fee simple; because the gift does not *281 specify from what body the heirs male or female shall issue. And Lord Coke says, it was adjudged in parliament, that where lands were given to a man and his heirs male, this was a fee simple; for the grant of a subject shall be taken most strongly against himself. (*a*)

19. A feoffment was made to the use of the feoffee and the heirs of his body, and for default of such issue, to G. D. and his heirs male lawfully engendered, † and for default of such issue, to the right heirs of the feoffor. All the Judges were of opinion that G. D. took an estate in fee, and that it could not be an estate tail, because there was not any *body* from whom his heir male should come. (*b*)

20. But if there be *any other words* in a gift of this kind, from which *an intention* to restrain the generality of the words "*heirs male*," to the body of the grantee, can be inferred, such gift will be construed to pass an estate tail.

21. A feoffment was made to the use of the feoffor for life, remainder to the use of G. Beresford, son and heir of the feoffor, and the heirs male of his body lawfully begotten; and for default of such issue, to the use of Aden Beresford and of the heirs male of the said Aden lawfully begotten; and for default of such issue, &c. The question was, what estate Aden took. It was contended, upon the authority of Abraham *v.* Twigg, that he took an estate in fee simple. But it was resolved that he only took an estate tail; because there were words equivalent to the words *de corpore.* (*c*)

Lord Ch. J. Willes has said, that this case can hardly be cited as an authority in any case whatever, unless a deed of uses should happen to be penned exactly in the same words. (*d*)

22. It is laid down, by Hales, Just., *arguendo*, in 4 Edw. VI., that, if land be given to a person and his heirs, and if the donee

(*a*) Lit. s. 31. 1 Inst. 27 b.
(*b*) Abraham *v.* Twigg, Cro. Eliz. 478.
(*c*) Beresford's case, 7 Rep. 41. *Ante*, s. 19.
(*d*) Willes, R. 374.

† [For similar words in a devise which were adjudged to give an estate tail, see Nanfan *v.* Legh, 7 Taunt. 86.]

die without heirs of his body, that it shall *remain to another;* this shall be a good estate tail, by the equity of the statute, although it be out of the words. And this doctrine is confirmed by several cases. (*a*)

23. A feoffment was made to the use of the first son of
282* James, *who should have issue male of his body, and to his heirs; and for want of such heirs, to another. This was held to be an estate tail. (*b*)

24. A feoffment was made to the use of the feoffor for life, remainder to the use of his son Thomas and his heirs forever, and for default of issue of the body of the said Thomas, to the use and behoof of the right heirs of the feoffor. The Court said, the intention of the feoffor was plain, that an estate in fee should not pass to the son. It was no more than if a gift had been made to a man and his heirs, viz., to the heirs of his body, so that it was only an estate tail. (*c*)

25. In a subsequent case, however, where a copyhold was surrendered to the use of V. and A., his wife, *pro et durante termino vitarum suarum, et hæredum et assignatorum prædictorum V. et A., et pro defectu talis exitus*, to the use of the right heirs of the grantor forever, it was held, by Lord Holt, Powis and Powell, that this was an estate in fee; contrary to the opinion of Gould, who thought it should be construed an estate tail; that being the intent of the grantor. (*d*)

26. Littleton says, where lands are given to *a man and his wife, and to the heirs male of their two bodies begotten*, they have an estate tail.[1] Lord Coke, in his comment, adds: but what if the tenements be given to a man and to a woman, not being his wife, and to the heirs male of their two bodies? They have also an estate tail, albeit they be not married at that time. And so it is if lands be given to a man who has a wife, and to a

(*a*) Plowd. 53, 541. (Simpson *v.* Ashworth, 6 Beav. 412.)
(*b*) Beck's case, Lit. R. 344.
(*c*) Leigh *v.* Brace, 5 Mod. 266. 1 Ld. Raym. 101.
(*d*) Idle *v.* Cook, 1 P. Wms. 70. Doe *v.* Smeddle, 2 Barn. & Ald. 126.

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[1] A conveyance to husband and wife during their lives, then to the issue of the husband, their heirs and assigns, and in default of issue, then to the husband's right heirs in fee, vests an estate tail in the husband. Baughman *v.* Baughman, 2 Yeates, 410.

woman who has a husband, and the heirs of their two bodies, they have presently an estate tail, for the possibility that they may marry. (*a*)

27. If lands be given to two husbands and their wives, and to the heirs of their bodies begotten, they shall take a joint estate for life, and several inheritances, viz., the one husband and his wife the one moiety, and the other husband and wife the other moiety. And no cross remainder or other possibility shall be allowed by law, where it is once settled, and has taken effect. But if lands be given to a man and two women, and the heirs of their bodies begotten, they have a joint estate for life, and every of them a several inheritance; because they cannot have one issue of their bodies. Neither shall there be, by any construction, a possibility upon a possibility: viz., that he shall marry * the one first, and then the other. The same law *283 is, where land is given to two men and one woman, and to the heirs of their bodies begotten. (*b*)

28. Littleton says, if lands be given to a man and his wife, and to the heirs of the body of the man; in this case the husband has an estate in general tail, and the wife an estate for life. Also if lands be given to the husband and wife, and to the heirs of the husband, which he shall beget on the body of his wife; in this case, the husband has an estate in special tail, and the wife but an estate for life. And if the gift be made to the husband and wife, and to the heirs of the body of the wife, by the husband begotten; there the wife has an estate in special tail, and the husband but for term of life. But if lands be given to the husband and wife, and to the heirs which the husband shall beget on the body of the wife; in this case, both of them have an estate tail; because the word "*heirs*" is not limited to the one, more than to the other. (*c*)

29. Lord Coke has observed on this passage, that the word "*heirs*" is *nomen operativum;* to which of the donees it is limited, it creates an estate tail. But if it incline no more to the one than to the other, then both do take: and therewith accords the case in 3 Edw. III., where *Robertus de S. dedit Johanni de Ripariis et Matildæ uxori ejus, et hæredibus quos idem Johannes de corpore ipsius Matildæ procrearet,* &c.; which was adjudged

(*a*) Lit. s. 25. (*b*) Tit. 18, c. 1. (*c*) Lit. ss. 26, 27, 28.

to be an estate in special tail in them both; because the estate was equally tailed to the heirs of the baron, as to the heirs of the wife. (*a*)

30. In conformity to the above case, it has been long established, that where a limitation is made to the heirs *of* the body of the wife, by the husband to be begotten, *the wife* shall take an estate tail. But if the words are to the heirs *upon* or *on* the body of the wife by the husband to be begotten, *both husband and wife* take an estate tail. And Mr. Fearne has observed, that however light or frivolous the distinction in these cases between the word *of*, and the words *on* or *by*, may now appear, yet it having originally, upon principles now obsolete, obtained ground in judicial decisions, the Courts held themselves bound to observe it. (*b*)

31. Thus where a limitation was to the husband and wife for their lives, remainder to the first and other sons of the
284* body of *the wife, remainder to the heirs of the body of the wife by the husband to be begotten; it was held an estate tail in the wife. But the Court said, if it had been to the heirs which the husband should beget *on* the body of the wife, it would have created an estate tail in both; for which was cited 19 Hen. VI. 75 *a.*, giving the same reason as Littleton does; because the word "*heirs*" was indifferently limited to both. (*c*)

32. A person, in consideration of marriage, covenanted to stand seised to the use of himself and his wife for their natural lives, and the life of the longer liver of them; remainder to the use of the heirs *on* the body of the said wife by the said husband lawfully to be begotten; and for default of such issue, to the use of the right heirs of the husband forever. A question arose, whether this limitation raised an estate tail solely in the wife, or a joint estate tail in the husband and wife. Mr. Justice Ashurst said, the question depended on positive determinations, rather than on reasoning. If the words of limitation had been — "the heirs *of* the body of the wife by the husband to be begotten," the case would be otherwise, and the wife would take an estate tail; but as the word was *on* and not *of*, all the determinations were the other way; particularly those in 3 Edw. III. and in

(*a*) 1 Inst. 26 a, n. 3. 1 Inst. 219 a, n. 3.
(*b*) Fearne, Cont. Rem. 39.
(*c*) Reps *v.* Bonham, Yelv. 131.

Styles; and therefore both husband and wife took an estate tail. If the Court was at liberty to go into the intention of the parties, he should have been inclined to have read the word *of* instead of *on*, because the wife ought to be considered as a purchaser, but they were tied down by express authorities. Judgment was given accordingly. (*a*)

33. An estate tail may be created by *a limitation to the heirs of the body of A*, provided A be dead when the limitation takes effect; and will vest in the person answering the description of such special heir. And in case of his death without issue, it will go to the person who would be entitled to such estate, if it had originally vested in the ancestor of the first taker.

34. This doctrine is founded on the authority of the following case in 17 Edw. II.—John de Mandevile, by his wife Roberge, had issue Robert and Maude. M. de Merwell gave certain lands to Roberge, and to the heirs of John Mandevile her late husband, on her begotten. It was adjudged, that Roberge had an estate but for life, and the fee tail vested in Robert (heirs of * the body of his father being a good name of purchase); *285 and that when he died without issue, Maude the daughter, was tenant in tail, as heir of the body of her father, *per formam doni*. (*b*)

35. Mr. Fearne observes, that in the case of a limitation to the heirs male of the body of A, the devolution, after the decease and failure of issue male of the first special heir of A., to other heirs, equally falling within the same description, has been styled a descent *per formam doni*. But this sort of acquisition of, or succession to, an estate tail, by the heirs male of the body of A, in a collateral line between themselves, is not strictly a descent; nor does it operate as a purchase. It is not strictly or completely a descent, because the estate never attached, or by possibility could attach, in the ancestor, or be derived from or through him. It has not the effect of a purchase, because the estate goes in the same course of succession as it would have done under a descent, exclusive of persons to whom it would have gone, if the heirs male had taken absolutely by purchase. (*c*)

(*a*) Donn *v.* Gillot, 2 Term Rep. 431.
(*b*) Mandeville's case, 1 Inst. 26 b, 220 a. Southcot *v.* Stowell, 2 Mod. 207.
(*c*) Fearne, Cont. Rem. 110.

36. In a subsequent paragraph, Mr. Fearne says:—"It seems in truth of a compound or intermediate description, betwixt a descent and a purchase. In point of acquisition, it has the quality of the latter, as not being derived from or through the ancestor; but in regard to its course of devolution, it is referable to the former, as pursuing the very same channel of transmissive succession. It is a sort of entail which, though it first attaches in the special heir, according to the nature of the description, yet terminates not in him and his representatives, of the species denoted, but continues its progress through the whole race of heirs described, in the same course as if it had been an estate vested in the ancestor, descendible from him to his heirs of that description." (*a*)

37. The *usual mode of limiting estates tail in settlements*, where an estate for life is given to the ancestor, is, to the use of the first son † of the body of the said A. B. by the said C. D. (his intended wife,) and of the heirs male of the body of such son lawfully issuing; and for default of such issue, to the use of the second, third, and all and every other the son and sons of
286 * the body of the said A. B. by the said C. D. lawfully * begotten; severally, successively, and in remainder, one after another, as they and every of them shall be in priority of birth; and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs male of his body issuing, being always preferred, and to take, before the younger of the same sons, and the heirs male of his and their bodies issuing; and for default of such issue, &c.

38. In a modern case, there was a limitation [in remainder] in a feoffment to the use of Nicholas Smyth for life, remainder [after intermediate remainders to trustees to preserve contingent remainders, and to other trustees for 700 years] to the use of the first son of the body of N. Smyth lawfully issuing; and for default of such issue, to the use and behoof of the second, third, fourth, and all and every other son and sons of N. Smyth law-

(*a*) Idem, 112.

[† On the construction of the words first and second sons in deeds and wills, see Vol. VI. ch. X. s. 52, note.]

fully issuing, severally and successively, &c.; and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, [the elder of such sons, and the heirs male of his and their bodies to be preferred and take, before the younger of the same sons and the heirs male of his and their body and bodies. There was a power for a subsequent tenant for life to jointure, in case he should survive a preceding tenant for life, (to whose first and other sons there were proper limitations in tail male,) and the said Nicholas Smyth, and they should both depart this life without leaving any issue male of their bodies.] Upon a case sent from the Court of Chancery to the Court of Common Pleas, respecting the estate which the eldest son of N. Smyth took under his limitation, Lord Chief Justice Eyre said:—"I think this is one of the clearest cases I ever saw; there is a demonstation plain on the face of the feoffment, that it was the intent of the parties that an estate tail should be limited to the eldest son of N. Smyth. The argument on the part of the defendant has occasionally shifted; sometimes admitting the intent, but contending that the words used were not sufficient to effectuate that intent, which I thought was the true way of considering the question; and sometimes denying the intent itself. But no man can read this deed without seeing the intent I have mentioned; though, by some strange blunder, the usual words are omitted. If, indeed, it had stopped at the limitation to the first son of Nicholas, I should have *agreed *287 with the counsel for the defendant; for it certainly does not follow, that because we can see an intent in the face of a deed, therefore that the words used are sufficient to effectuate that intent. But the intent here does not rest on the first expressions; but the other part of the deed respecting the trusts and other limitations, refers to an estate tail in the first son of N. Smyth. The intent, then, being plain, the question is, whether we can find sufficient words. I, for one, adhere to the rule which forbids the raising estates by implication in deeds, and think that we ought not to grant the same indulgence to inaccuracy, in the construction of deeds, as we do in wills. But here it is not necessary to resort to implication, or to inquire whether the same latitude is to be allowed to conveyances to uses, as to wills; for here there are strict technical words, capable of being

applied to the limitation to the first son of the body of N. Smyth, so as to give him an estate tail. The limitation is to the first son, and for default of such issue, the whole line of sons is taken in, without any particular limitation to them, and the heirs of their bodies *nominatim;* but it is to the several heirs male of the body and bodies of all and every such son and sons respectively issuing. Fortunately it is not said, to the heirs male of the body and bodies of such second, third, and other sons, &c. If it had been so, it could not perhaps have been got over. But the limitation is to the heirs male of the body and bodies of *every such son.* Now the case of Doe *v.* Martin is an authority to warrant the application of those words to the limitation of the first son of N. Smyth, as well as to the others. But this case is stronger than Doe *v.* Martin; for it does not even require the assistance of punctuation. Upon the whole, therefore, it is clear that the plaintiff [the only son of Nicholas Smyth] took an estate tail under the limitation in the deed to the first son of the body of N. Smyth." The other Judges concurring in this opinion, the Court certified that the plaintiff, who was the eldest son of N. Smyth, took an estate tail in the lands in question. (*a*)

39. With respect to the words that are necessary to create an *estate for life*, those usually inserted for that purpose, in deeds, are, "*To hold to the said A. B. and his assigns, for and during the term of his natural life.*" But it has been already stated that if lands are conveyed to a natural person *without any words* 288* *of limitation* whatever, he will take an estate for his own life;[1] unless the grantor be only tenant for his own life, in which cases the grantee will take an estate for the life of the grantor only. (*b*)

40. Under a limitation to the father for life, remainder to his issue male, and for want of such issue to the father in fee; Lord Bathurst held, that the issue only took estates for life; in conformity with the opinion of Mr. Fazakerly and Mr. Wilbraham, to whom the case had been previously referred. (*c*)

(*a*) Owen *v.* Smyth, 2 H. Black. Rep. 594. *Ante.* See also Galley *v.* Barrington, 2 Bing. 387, 391. (*b*) *Ante*, c. 20.

(*c*) Fitzherbert *v.* Heathcote, 4 Ves. 794. Wheeler *v.* Duke, 1 Crom. & Mee. 210.

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[1] This rule is abolished in several of the United States. See *supra*, § 1, note. In others it is recognized. Clearwater *v.* Rose, 1 Blackf. 137; 4 Kent, Comm. 25.

41. *Estates for years* are usually created in deeds by the words, "*To hold to the said A. B., his executors, administrators, and assigns, from the day of the date hereof, for and during, and unto the full end and term of twenty-one years thence next ensuing, and fully to be complete and ended.*" [1] But *any other words* showing the intention of the parties, will be equally effective.

42. The technical words for creating an *estate at will are*, "*To hold to the said A. B. at the will of the lessor.*" (*a*)

43. With respect to the words which are necessary to create an *estate in joint tenancy*, it has been already stated, that where lands are granted to two or more persons, except husband and wife, to hold to them and their heirs, or for the term of their lives, or for the term of another's life, without any restrictive, exclusive, or explanatory words; all the persons to whom lands are so given take as joint tenants. (*b*) [2]

44. A man conveyed his house and farm to trustees, upon trust that his sisters might inhabit the house, and equally divide the rents and profits between them; and the whole to the survivor of them. Resolved, that this was a joint tenancy; for although the words "*equally to be divided*," sometimes in a will make a tenancy in common, yet the limitation to the survivor will oust such a construction, even in a will. (*c*)

45. In the case of Fitzherbert *v.* Heathcote, a limitation to the issue male was held to create a joint tenancy for life. (*d*)

46. Where the words of a settlement were, "to permit all and every the children to take the rents to them and their heirs forever," they took as joint tenants.

47. A settlement was made before marriage, in trust to permit the husband to take the rents for ninety-nine years, if he should so long live, and after his decease, to permit the intended wife to *take the rents for her life, for her jointure; and *289 after the decease of the survivor of them, upon trust to permit and suffer all and every the child and children of the

(*a*) Lit. s. 68. (*b*) Tit. 18, c. 1.
(*c*) Clerk *v.* Clerk, 2 Vern. 823. Ward *v.* Everet, 1 Ld. Raym. 422. (*d*) *Ante*, s. 40.

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[1] More briefly,—*To hold to the said A. B., and his assigns, from the date hereof for the term of twenty-one years.*

[2] In the United States, this rule is reversed, and the grantees are tenants in common, except in some special cases. See *ante*, tit. 18, ch. 1, § 2, note.

body of the husband, by the wife, to take the rents of the said premises, to them and their heirs forever, in such shares and proportions as the husband should appoint; and for want thereof, in trust to permit and suffer all and every such child and children to receive and take the rents and profits of the said premises, to them and their heirs forever. There were three children of the marriage, who survived their father and mother, and no appointment was made. The question was, whether the three children took as joint tenants, or tenants in common. Lord Thurlow declared that, according to the true construction of the settlement, the estates comprised therein were to be considered as settled on the children of the marriage in joint tenancy, subject to the power of appointment, which was never executed. (*a*)

He also said, that whether the settlement was to be 290* *considered as the conveyance of a legal estate, or a deed to uses, would make no difference; and that it was a joint tenancy.

48. Where it was covenanted in marriage articles to lay out a sum of money in the purchase of lands, to be settled on the husband and wife for their lives, with remainder to the heirs of both their bodies; and also, that certain leaseholds should be in trust for the children of the husband; the children were held to take the leaseholds as joint tenants.

49. Sir Robert Staples, being seised in fee of certain lands, and possessed of others under leases from a bishop, for terms of years, renewable on payment of fines, by articles covenanted in consideration of marriage, that he, his heirs, executors, or administrators, would lay out £2000 in the purchase of lands of inheritance, to be settled to the use of Sir Robert for life, with remainder to his intended wife for life; remainder to the use of their heirs of both their bodies. And it was also thereby covenanted, that the leases for years whereof Sir Robert was 291* *then possessed, should be in trust for the said Sir Robert for life, and after his decease, to the use of, and in trust for, the children of the said Sir Robert by his intended wife. Sir Robert Staples died, leaving three sons; and a question arose, whether they took the leasehold estates as joint tenants, or tenants in common. The Court of Exchequer of Ireland decreed,

(*a*) Stratton *v.* Best, 2 Bro. C. C. 233.

that they took as tenants in common. From this decree there was an appeal to the House of Lords; the appellants insisting that all the children of Sir R. Staples were clearly joint tenants of the leasehold estate. (*a*)

* The decree was reversed, upon the principle that the *292 children took as joint tenants.

50. Littleton says, if lands be given to two, to have and to hold them, *scilicet*, the one moiety to the one and to his heirs, and the other moiety to the other and to his heirs, they are *tenants in common*.[1] And Lord Coke, in his comment, says, the reason is, because they have several freeholds, and an occupation *pro indiviso;* for the *habendum* severs the premises, that *primâ facie* seemed to be joint; for an express estate controls an implied one. (*b*)

51. A person covenanted to stand seised to the use of A for life, and after to two, *equally to be divided*, and to their heirs and assigns forever. Lord Keeper North declared, that the inheritance was in common. He said, it had been held, that where the words were to two, equally divided, that should be in common; otherwise if the words were, equally to be divided; but since taken to be all one. (*c*)

52. A man assigned a term to trustees, in trust to permit himself to receive the profits thereof during his life, and after his death, in trust to permit his two daughters, B and C, their executors and administrators, to receive the profits during the residue of the term, equally to be divided between them; they paying so much within two years to his two other daughters. The Master of the Rolls (Sir J. Trevor) held, that this being a trust of a personal thing, they were tenants in common;

* and that the father's intention appeared so in the consid- *293 eration, which was to make several and distinct provisions for his two daughters; and the paying of the sums appointed to their two sisters, made them purchasers. (*d*)

(*a*) Staples *v.* Maurice, 4 Bro. Parl. Ca. 580.
(*b*) 1 P. Wms. 18. Lit. § 298. *Ante*, c. 21, § 83.
(*c*) Anon. 2 Vent. 365.
(*d*) Hamell *v.* Hunt, Prec. in Cha. 164.

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[1] In the United States, the general rule is, that all estates, vested in two or more persons, are to be deemed tenancies in common, unless a different tenure is clearly apparent from the instrument creating the estate. See *ante*, tit. 18, ch. 1, § 2, note.

53. A copyholder in fee had issue four sons and two daughters, and surrendered his copyhold to the use of his wife for life, and after her death, to the use of his three younger sons and two daughters, equally to be divided, and their respective heirs and assigns forever. The question was, whether these words made a tenancy in common, or whether the sons and daughters took as joint tenants. The Judges delivered their opinions *seriatim*. Gould, Just. The sons and daughters take as tenants in common, and not as joint tenants. In the construction of deeds, this rule is to be observed, viz., to make all parts of them take effect, according to the intent of the parties, so as it be not contrary to the rules of law; and it will not be inconsistent with any rule of law, to construe this a tenancy in common; the words, upon which we are to judge, being not words of limitation, or creation of an estate, but of qualification and correction. There are no precise words requisite to make a tenancy in common; the words, "*equally to be divided*," go to the quality of the estate, and not to the limitation of it. The intention of the surrenderor was to make provision for his younger children and their heirs; which will not take effect, if it be a joint estate. Surrenders of copyhold land to uses shall have the same favorable construction as wills, and are not to be tied up to the strict rules of common law, but expounded according to the intention of the party. The words "*equally divided*," or "*equally to be divided*," make a tenancy in common in a will, beyond dispute; and we are here in the case of a use, which bears the like construction with a will. Turton, J., of the same opinion, and argued much to the same effect. Holt, C. J., *contra*. Copyhold lands do not differ in construction of law from freehold lands; and surrenders of copyholds must be governed by the same rules as conveyances at common law. By this surrender, the sons and daughters are joint tenants, and not tenants in common; for the words "*equally to be divided*," signify no more than the law would have implied without them; and therefore they can have no operation. 1 Inst. 186 *a*. One joint tenant can only forfeit or dispose of his own part; and if both 294.* join in a feoffment, and one die, it must be pleaded as the feoffment of both, and not of the survivor only. The true difference between joint tenants and tenants in common, is

put in Littleton, s. 292. Joint tenants hold by one joint title, but tenants in common by several titles. In our case, the title is joint, and all claim under the same conveyance. The word "*equally*" doth not alter the manner of taking the profits, there being no difference in that respect between joint tenants and tenants in common. There is a difference between wills and conveyances at law, and words in the one shall have a different construction from what they would have in the other. It was after some time and debate that these words (*equally to be divided*) obtained to make a tenancy in common; and the doubt proceeded from hence, (*scil.*) because they did not make an estate a tenancy in common at law; for if they had, there could then have been no doubt upon a will. It has been hitherto the constant opinion, both at the bar and at the bench, that those words will not make a tenancy in common in a deed. Judgment was given, that it was a tenancy in common. (*a*)

54. George Everinden, by deed poll, in consideration of natural love and affection to his wife and children, did give, grant, and confirm to his two daughters, all the rents and profits of two tenements, during the life of his wife, equally to be divided between them, paying the sum of £5 per annum to his wife; and after the decease of his wife, his two daughters, to share, hold, and enjoy the said lands, to them and their heirs forever, equally to be divided between them. One of the daughters died, leaving children. The question was, whether the two daughters took as joint tenants, or tenants in common. (*b*)

Lord Hardwicke, (upon the authority of Fisher *v.* Wigg, strengthened by the special circumstances of this case, where the intent was to make provision for the grantor's children and their children, was of opinion that it was a tenancy in common.)

*55. John Curl, by indentures of lease and release, conveyed the lands in question to trustees, to the use of himself and his wife for their lives, remainder to the use of all and every the children of John Curl, and their heirs, equally to be divided amongst them. The question was, whether they took as joint *296

(*a*) Fisher *v.* Wigg, 1 P. Wms. 14. 12 Mod. 296. 1 Ab. Eq. 291. *Vide* tit. 87.
(*b*) Rigden *v.* Vallier, MSS. Rep. 2 Vez. 252.

tenants or tenants in common. Lord Chief Justice Lee delivered the unanimous opinion of the whole Court, that this being a deed of uses, must be construed according to the intent of the parties, which most plainly was, that the children should take in common. And they relied upon the case of Fisher *v.* Wigg, where the same point was determined in the case of a copyhold, which the Chief Justice said was never reversed, notwithstanding what is said in 1 Ab. Eq. 291. The Court also cited the case of Rigden *v.* Vallier; and gave judgment that the words "*equally to be divided*," in a deed of uses, created a tenancy in common. (*a*)

56. In a modern case, Lord Mansfield said, the opinion of the two Judges in Fisher *v.* Wigg, who differed from Lord Holt, appeared to be the better one; more liberal and better founded in law. And Mr. Justice Aston observed, that the words "*equally to be divided*," had been determined to create a tenancy in common in a deed. (*b*)

57. It has been stated, that in several cases, where two or more persons make *a joint purchase*, they shall be considered in *equity* as tenants in common; though the words "*equally to be divided*," be not inserted in the conveyance. (*c*)

58. The *usual manner* of creating a tenancy in common, is to limit the estate to two or more persons, "*equally to be divided among them; they to take as tenants in common, and not as joint tenants.*"

298* *59. Where lands are given, in undivided shares, to two or more persons, for particular estates; so as that upon the determination of the particular estates in any of those shares, they remain over to the other grantees, and the remainder-man or reversioner is not let in till the determination of all the particular estates; there the grantees take their original shares as tenants in common, and the remainders limited among them, on the failure of the particular estates, are called *cross remainders*. But *no technical words are necessary* to create such remainders; for any expressions, which sufficiently indicate the intention of the parties, will have that effect.

60. It is however a fundamental rule of law, that *cross remainders cannot be implied in a deed.* And Mr. Serjeant Williams

(*a*) Goodtitle *v.* Stokes, 1 Wils. R. 341. *Ante*, s. 53, 54. (*b*) Cowp. R. 660.
(*c*) Tit. 18, c. 1.

observes, that the reason of this rule is to be found in 1 Roll. Ab., where it is said, that if a man makes a feoffment in fee, to the use of J. S. and J. D., and the heirs male of their bodies; and for default of such issue of either of them, to the use of the survivor of them, having issue male; and to the issue male of such issue male; and for default of issue male of their bodies, the remainder to another; by this gift J. S. and J. D. have several inheritances, and no cross remainder in tail is raised by the words after, for want of the word "*heirs;*" for though it be by way of use, yet an estate tail cannot be raised without the word heirs. (*a*)

61. In ejectment, upon a long special verdict, the following point was resolved by the Court, and declared by Lord Hale as the opinion of himself, and the rest of the Judges:—That where one covenants to stand seised to the use of A and B, and the heirs of their bodies, of part of his land, and if they die without issue of their bodies, then to remain, &c.; and of another part of his land, to the use of C, D, and E, and the heirs of their bodies, and if they die without issue of their bodies, then to remain, &c.; that here, there are no cross remainders created by implication, for there never shall be such remainders upon the construction of a deed, though sometimes there are in the case of a will. (*b*)

62. A, upon the marriage of his son B, who had two children then living, conveyed lands by deed to trustees, to the use of himself for life, remainder to B for life, remainder to trustees to preserve contingent remainders, remainder to the use of such * child or children of B, and in such shares, &c., as B should appoint; and in default of appointment, to the use of all and every the children of B, and the heirs of their several and respective bodies, as tenants in common; but if only one child, to the use of such only child, and the heirs of his or her body; and in default of all such issue, to the right heirs of A forever. B had other children, and died without having made an appointment. It was held, that B's children took vested interests as tenants in tail, notwithstanding the power of appointment; and that there were no cross remainders between

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(*a*) 1 Saund. 185, n. 6. Nevell *v.* Nevell, 1 Roll. Abr. 837, R. pl. 2.
(*b*) Cole *v.* Levingston, 2 Vent. 224.

them, but on the death of each child without issue, his share fell into the reversion. (*a*)

63. By a settlement made previous to marriage, lands were limited to the use of all and every the daughter and daughters of the marriage, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters lawfully issuing; and for default of such issue, to the use of the right heirs of the husband. A question arose upon this settlement, whether they were cross remainders between the daughters and their issue. (*b*)

Lord Kenyon said, this was the case of a deed, in which by the practice of centuries no such implication could be raised. And it would be of most dangerous consequence to have this point disputed, upon which so many titles must depend. It was probably intended, that no part of the settled estate should go over, as long as there was any issue of the marriage remaining; but the parties had not said so. There were certain words used to express such an intention in deeds, which were well known; those had not been adopted in the present case, but the framers of the settlement had left that intention to be implied from other words, which could not be done. He would not go through all the cases, because they were collected with great ability by Mr. Serjeant Williams, in a note, in his edition of Saunders' Reports, to which he referred. (*c*) They established the proposition he had before laid down, in respect to the construction of deeds, which never had or could be suffered to be doubted, without affecting an infinite proportion of the property in the kingdom, and removing land-marks.

Mr. Justice Lawrence observed, that in order to raise cross remainders in a deed between the issue of the first takers, 300* there * must be a limitation to the heirs of the body, which was not necessary in a will. And Mr. Justice Le Blanc remarked, that it was *not sufficient, in a deed, that one may collect such an intention of the parties from the words;* but cross remainders must be *expressly limited, by proper words of conveyance.* It was resolved, that no cross remainders were created in this case.

(*a*) Doe *v.* Dorvell, 5 Term Rep. 516.
(*b*) Doe *v.* Worsley, 1 East, 416.
(*c*) 1 Saund. 185 a, n. 6.

64. [In the recent case of Edwards *v.* Alliston, by settlement previous to marriage, lands were settled, "to the use of all, and every the child and children of the marriage, equally to be divided between or among them, (if more than one,) share and share alike, as tenants in common, and not as joint tenants, and to the use of the several and respective heirs of the body and bodies of all and every such child and children lawfully issuing, and if there should be a failure of issue of the body or bodies of any such child or children, then, as to the part or share, or parts or shares of such child or children whose issue should so fail, to the use of the remaining or other children of the marriage, equally to be divided amongst them, (if more than one,) share and share alike as tenants in common, and to the use of the several and respective heirs of the body and bodies of such remaining and other children lawfully issuing; and in case there should be a failure of issue of the bodies of all such children but one, or if there should be but one such child, then to the use of such remaining or only child in tail, and for default of such issue, to the right heirs of the settlor. There were seven children, and four died without issue; the three remaining children and their husbands suffered a recovery, and upon a sale, the title was objected to, on the ground that there were no words in the above limitation, to create cross remainders, as to surviving shares taken by the children who afterwards died without issue. It was contended, that although there was a direction that the part or parts of a child or children whose issue should fail, should go to the remaining children, and, consequently, that if any of these remaining children should die without issue, their original shares were by the words limited over, yet, there were no words which would carry the shares that had accrued. Sir John Leach, M. R., decided in favor of the objection, observing, that although no doubt could be entertained of the settlor's intention, no one could arrive at such a conclusion without that sort of im-
*plication, which, according to the authorities, was exclu- *301
ded from a deed. His Honor distinguished the principal case from that of Doe *v.* Wainewright, next cited, by the peculiar expressions in that case, "and so *toties quoties*, &c.," which were properly considered as expressly extending the cross remainders to accruing shares.] (*a*)

(*a*) 4 Russ. 78.

65. The limitations in a deed were, to the use of such child or children as Mary Abell should thereafter have, as tenants in common, (if more than one,) and the heirs of their several bodies issuing. "And in case any such child or children should die without issue of his, her, or their body or bodies issuing, then the part or parts of him, her, or them so dying without issue, should be and remain to the use of the surviving child or children of the said Mary Abell, and the heirs of his, her, or their respective bodies issuing, and so *toties quoties*, as any of the said children should die without issue, till there should be only one child left; and in case all the said children should die without issue, or if the said Mary Abell should have no issue of her body, then to Robert Abell, his heirs and assigns forever." (*a*)

The question was, whether there were cross remainders between the children of Mary Abell.

Lord Kenyon said, this case did not involve any question respecting the raising of limitations by implication, because the deed on which the question arose, contained express limitations by way of cross remainders, not indeed in the formal language used by conveyancers, but in terms sufficiently denoting the intention of the parties to the deed, that there should be cross remainders, as to some of the children. Therefore, all the cases which were cited to show that cross remainders in a deed could not be raised by implication, might fairly be laid out of the case; because this case, when considered, did not resolve itself into any question of that kind. No technical precise form of words was necessary to create cross remainders; it was sufficient to say that there should be cross remainders, though in the verboseness of conveyancers, an abundance of words was generally introduced in deeds for this purpose. Here, the single question arose on the meaning of the word "*surviving*," which, indeed, was the only word that distressed the case. But taking the whole context together, he did not think that that word rendered the case doubtful. The fair construction of that word, standing in
302 * * the context, was, that on the death of one child, without issue, that portion should go to the surviving line of heirs, and not entirely to one child surviving. It must go to the sur-

(*a*) Doe *v.* Wainewright, 5 Term R. 427. Meyrick *v.* Whishaw, 2 Barn. & Ald. 810. Levin *v.* Weatherall, 1 Bro. & Bing. 401.

viving children in their own persons, if living; or if dead, to their issues. And in putting this construction, he did not think the Court proceeded on conjecture merely; for the conclusion of this sentence was: "and in case *all* the said children should die without issue," then the remainder is limited to R. Abell in fee. The Court could not give effect to the word *all*, without determining that there must be cross remainders, not only as long as the individual children, but as long as the several lines of those children, existed. The whole context required this construction, and the last clause could not be satisfied with any other.

Judgment was given, that the deed created cross remainders between the children of Mary Abell; and that on the death of one without issue, his share vested in a surviving child, and the heir of one deceased, as tenants in common.

66. In the case of *marriage articles*, the *construction is founded on the apparent intent* of the parties, however untechnically expressed, and is, therefore, more liberal than in the case of deeds. (*a*)

67. By articles entered into previous to a marriage, the intended husband covenanted to transfer stock to trustees, to be laid out in the purchase of land, which was to be settled to the use of the husband and wife for their lives; and after the death of the survivor, to the use of all the children, male and female, of their bodies, equally, as tenants in common, and their respective issue, and for default of such children and their issue, to the use of the heirs and assigns of the survivor of the husband and wife. (*b*)

Lord Camden said, he was clear there could not be cross remainders by implication in a deed; that this was not the case of a settlement completed, but of articles executory; by the first part of the articles, which considered the fund as money, nothing was to go over till the children were dead without issue; this would assist him in construing the limitations of the land. As the survivor of the husband and wife was to take nothing in the money till all the children were dead without issue, so they should not take any interest in the reversion of the land, but in the same way. Decreed that there were cross remainders.

*68. By articles of agreement, made between Charles, *303

(*a*) *Ante*, c. 20.

(*b*) Twisden *v.* Lock, Amb. 663.

Duke of Richmond, and William, Earl of Cadogan, previous to the marriage of Lord March, the Duke of Richmond's eldest son, with Lord Cadogan's daughter, Lord Cadogan covenanted to lay out £60,000 in the purchase of lands, to be settled on Lord March and his intended wife for their lives, remainder to the children of the marriage, except the eldest son, as the father and mother should appoint; and for want of appointment, to all the children, except an eldest son, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants, and to the several and respective heirs of their respective bodies issuing; and for want of such issue, to the use and behoof of such eldest son in tail, remainder to Lord Cadogan in fee. Lord March, who was afterwards Duke of Richmond, had issue by this marriage an eldest son, and six younger children; no appointment was made. By a private act of parliament, the lands purchased with the £60,000 were vested in the eldest son, upon his securing the portions of the younger children; one of the younger children died under age; and a question arose, whether her portion became vested in the surviving younger children, or went to the eldest son. (*a*)

Lord Apsley said, the words of the articles imported that cross remainders should be limited to the younger children; it being perfectly plain that the eldest son was never intended to take any share of the £60,000, so long as there remained a younger child in being, to take; for if there had been one younger child only, that child must have taken the whole. And decreed accordingly.

(*a*) Duke of Richmond's case, Collect. Jur. Vol. II. 347.

CHAP. XXIII.

RULE IN SHELLEY'S CASE.

SECT. 1. *Origin and Nature of the Rule.*
2. *How mediate Limitations are vested.*
13. *Of joint and several Limitations.*
19. *Both Estates must be by the same Instrument.*
25. *And be of the same Nature.*
28. *The Rule not extended to the words Son, Child, &c.*
29. *Nor to the word Heir, in the Singular Number.*
SECT. 32. *Nor to Marriage Articles.*
49. *Settlements in Pursuance of Articles rectified.*
54. *Except there are Purchasers.*
56. [*The Rule applicable to Estates* pour autre vie.]
57. *The Rule not formerly applied to Terms for Years.*
61. *But is now applied.*
64. *Unless a contrary Intention appear.*

SECTION 1. Where an estate was conveyed to A for life, with a remainder to the heirs, or heirs of the body of A; if the construction had been according to the strict meaning of the words, A would have only taken an estate for life, and the words "*heirs*," or "*heirs of the body of A*," would have been considered as words of purchase, giving a contingent remainder to the heirs, or heirs of the body of A. But it was found that this would be attended with several inconveniences. For, 1. The lord of the fee would have been defrauded of the wardship and marriage of the heir, who would take as a purchaser, without claiming any thing from his ancestor by hereditary succession. 2. The remainder to the heirs, or heirs of the body of A, being contingent, till the death of the ancestor, the inheritance would be in abeyance; and it has been observed that this was never allowed but in cases of absolute necessity. 3. If the remainder were construed to be contingent, no alienation of the inheritance could take place during the life of the ancestor. (*a*)

(*a*) Tit. 1, s. 43.

305* *2. To remedy this, it appears to have been very early established, as *a rule of law*, that "when *the ancestor*, by any gift or conveyance, *takes an estate of freehold*, and *in the same gift* or conveyance *an estate is limited*, either immediately or mediately, *to his heirs*, in fee or in tail; that always in such cases, the words "heirs," &c., are *words of limitation* of the estate, and *not words of purchase*." From which it follows that, [where the limitation to the heirs general or heirs special of the ancestor is immediate, that is, where there is no estate of freehold interposed between the limitation to the ancestor for life, and that to his heirs general or special, there the limitation to the heirs is *executed* in *possession*, and coalesces with the freehold in him, so that he is seised of an estate in fee-simple, or in fee tail in possession; but where there is an intervening estate, the limitation to the heirs general or special rests in the ancestor, taking the freehold, as a *vested remainder* in fee or in tail, subject to the preceding estate. This rule of construction excludes any contingent remainder in the heir. The words "*heirs*," &c., operate only to expand the estate of the ancestor, so as to let the heirs described into its extent, and entitle them to take derivatively, through or from him as the root of succession, or person in whom the estate is considered as commencing; they are therefore properly called words of limitation.] (*a*)

3. The case from which this rule took its name, and in which it was finally established, was thus: E. Shelley, being tenant in tail, suffered a recovery, and declared the uses of it to himself for life, without impeachment of waste, remainder to a trustee for twenty-four years, remainder to the heirs male of the body of E. Shelley, and the heirs male of the body of such heirs male, remainder over. It was resolved by the Chancellor, and all the Judges of England, except one, that the words, "*heirs male of the body*" of E. Shelley, should be construed to operate as words of limitation, and not as words of purchase; therefore that E. Shelley took an estate tail. (*b*) [1]

(*a*) 1 Inst. 22 b, 319 b. 2 Rep. 104 a. Harg. Tracts, 501. *Ante*, c. 21, s. 88. Fearne, C. R. 79, ed. 8.

(*b*) Shelley's case, 1 Rep. 93. Shelley *v.* Earsfield, 1 Rep. in Cha. 110.

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[1] The rule in Shelley's case has been adopted in *South Carolina*, Dott *v.* Cunnington, 1 Bay, 453; Carr *v.* Porter, 1 McCord, Ch. R. 60; in *North Carolina*, Payne *v.* Sayle,

4. In this case it was said, *arguendo*, that "if it should be admitted that in regard of the said subsequent words, (heirs

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8 Batt. 455; Davidson *v.* Davidson, 1 Hawks, 163; in *Tennessee*, Polk *v.* Faris, 9 Yerg. 209; in *Virginia*, Roy *v.* Garnett, 2 Wash. 9; in *Maryland*, Horne *v.* Lyeth, 4 H. & J. 431; Lyles *v.* Digge, 6 H. & J. 364; [Ware *v.* Richardson, 3 Md. 505;] in *Pennsylvania*, James's claim, 1 Dall. 47; Findlay *v.* Riddle, 3 Binn. 152; and in *Ohio*, M'Feely *v.* Moore, 5 Hamm. 465; and in *Georgia*, Neves *v.* Scott, 9 Law Reporter, p. 67. [See Williamson *v.* Mason, 23 Ala. 488.]

It has been abolished by statute, either in direct terms, or by necessary implication, in *Maine*, Rev. St. 1840, ch. 91, § 12; in *Massachusetts*, Rev. Sts. 1836, ch. 59, § 9; in *Connecticut*, Rev. St. 1838, tit. 57, ch. 1, § 5; in *New York*, Rev. St. Vol. II., p. 11, § 28, 3d ed.; in *Michigan*, Rev. St. 1837, 258, § 5, and in *Missouri*, Rev. St. 1845, ch. 32, § 7; Ib. ch. 185, § 46. Such, also, would seem to be the effect of the statute of *Illinois*, Rev. St. 1839, p. 149, § 6; and of *Arkansas*, Rev. St. 1837, ch. 31, § 5. The foregoing provisions apply to all modes of alienation, whether by deed or by will. In *New Jersey*, the rule is abolished, in terms, only in the case of devises. Elm. Dig. p. 130, § 5. So, in *New Hampshire*, Rev. St. 1842, ch. 156, § 5; and in *Missouri*, Rev. St. 1845, ch. 185, § 46.

The origin and principles of this rule are nowhere discussed with greater ability and learning than by Chancellor Kent, in the fourth volume of his Commentaries, Lect. 59, (iv.) p. 215–233.

Mr Hoffman recommends the following leading cases on this subject to the careful perusal of the student, as cases distinguished by great research. Smith *v.* Chapman, 1 Hen. & Munf. 240, which, he observes, is the most valuable case to be found on this subject in the American Reports; Brandt *v.* Gelston, 2 Johns. 384, an able case; McGinnis *v.* McPeake, Penn. R. 291; Bishop *v.* Selleck, 1 Day, 299; Dott *v.* Cunnington, 1 Bay, 453; Dott *v.* Wilson, Ib. 457; Shermer *v.* Shermer, 1 Wash. 267; Roy *v.* Garnett, 2 Wash. 9; Carr *v.* Porter, 1 McCord, Ch. R. 60; Horne *v.* Lyeth, 4 H. & J. 431; Lyles *v.* Digge, 6 H. & J. 364; See 1 Hoffm. Course of Legal Study, p. 186.

The rule is also discussed with great ability by Mr. Hayes, in his Principles for Expounding Dispositions of Real Estate, p. 52–56, 88–115.

The substance of this rule, as it is now settled and expounded by modern decisions, is this,—that where lands are granted or given, by devise or otherwise to one for life, and afterwards to his heirs, or the heirs of his body, these latter words are to be taken as words of limitation, and not of purchase; and consequently the first taker has an estate in fee simple or fee tail; *unless* it clearly and unequivocally appears that the words are used merely as *descriptio personarum*.

Lord Mansfield, in Doe *v.* Laming, 2 Burr. 1100, and Mr. Justice Blackstone, in Perrin *v.* Blake, 4 Burr. 2579, Hargr. Law Tr. 489, were of opinion that the rule was merely a *rule of interpretation*, in the absence of other evidence of the intention of the party; and that the *manifest intent* of the party might *control* the legal operation of the word *heir*, as a limitation.

But the old lawyers, Hargrave, Yates, and others, regarded it as an imperative and inflexible *rule of property, not to be controlled* by any other interpretation.

The opinions of Lord Mansfield and Mr. Justice Blackstone were deemed by the late lamented Judge Story to be those generally adopted in the United States, where the subject was not regulated by statute.

In limitations in marriage articles, in executory trusts, and in cases where the estate

male of the body of such heirs male,) the right heirs male should have by purchase, to them and the heirs male of their bodies, then a violence would be offered, as well to the words, as to the meaning of the party; for if the heir male of the body
306* * of Edward Shelley should take as a purchase, then all the other issue male of the body of Edward Shelley would be excluded to take any thing by the limitation; and it would be against the express limitation of the party. For the limitation was to the use of the heirs male of the body of Edward Shelley, and of the heirs male of their bodies begotten; and for default of such issue, to divers persons in remainder. So if Richard Shelley, being the heir male of the body of Edward Shelley, at the time of his death, should take by purchase, then the heirs male of the body of Richard Shelley only would be inheritable, and no other of the sons of Edward Shelley, nor their heirs male; and consequently if Richard Shelley should die without issue male, the land would remain over to strangers, and all the other sons of Edward Shelley, which he then had, and might afterwards have, and their issues, would be utterly disinherited, because the words were in the plural number, heirs male of the body of Edward Shelley: the former construction would be against the very letter of the indentures, for by that means the plural number would be reduced to the singular number, that is to say, to one heir male of the body of Edward Shelley only; and forasmuch as the first words, viz., "heirs male of the body of Edward Shelley," include the subsequent words, viz., "the heirs male of their bodies;" for every heir male begotten of the body of the heir male of Edward Shelley, was, in construction of law, an heir male of the body of Edward Shelley himself; for this reason the subsequent words were words declaratory, and did not restrain the former words. (*a*)

5. It appears from this passage, that besides the feudal reasons generally given for this rule, another existed; namely, that it was adopted as a rule of construction, *for the purpose of carrying into effect the general intent of the parties;* and therefore that it is merely what Sir W. Blackstone calls a *rule of interpretation or*

(*a*) 1 Rep. 104 a and b. *Vide* Morris *v.* Ward, tit. 38, c. 14.

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of the ancestor was legal, and that in the heir is equitable, or *e converso*, the rule does not apply. Horne *v.* Lyeth, 4 H. & J. 434, 435.

evidence, to ascertain the intention of the parties; by annexing particular ideas of property to particular modes of expression; not a rule of law, of an essential, permanent, and substantial kind, which cannot be transgressed by intention. (*a*)

6. Serjeant Roll has attempted a distinction respecting this rule, by saying that where the freehold is so limited to the ancestor, and a mediate remainder to his right heirs, that all the * intermediate estates, between that and the limitation to his heirs, as well as his own estate, may determine during his life; in that case the limitation to his heirs is in abeyance, because he can have no heir to take the remainder. But Mr. Fearne has controverted this distinction, and shown that the possibility of the freehold's determining in the lifetime of the ancestor who takes it, does not prevent the subsequent limitation to his heir from attaching in himself. (*b*) *307

7. It is immaterial with respect to this rule, whether the ancestor takes an estate of freehold by an express limitation, or by an implication arising from the deed in which the estate is limited to his heirs or the heirs of his body. In either case, the rule is applied, and the subsequent limitation vests in himself. (*c*)

8. Thus, in the case of Pybus *v.* Mitford, it was determined, that the covenantor took an estate for his own life, by implication; and that the subsequent limitation to his heirs male was executed in him, and united to the estate for life; so that he became tenant in tail. (*d*)

9. The *rule expressly requires*, that the *particular estate* should be *a freehold.* Therefore, where the ancestor takes only an estate for years, another person being the grantor, a remainder to his heirs, or the heirs of his body, will not vest in himself, but in such heirs, by purchase. (*e*)

10. A settlement was made upon a marriage by a third person, to the use of the husband for ninety-nine years, remainder to trustees during the life of the husband, to support contingent remainders, remainder to the wife for life, remainder to the first and other sons of the marriage, remainder to the heirs of the body of the husband, remainder to the right heirs of the husband.

(*a*) Harg. Tracts, 493.
(*b*) Roll. Ab. Vol. II. 418. Fearne, Cont. Rem. 33. Curtis *v.* Price, 12 Ves. 89.
(*c*) Fearne, Cont. Rem. [41.] (*d*) Tit. 11, c. 4, § 33. (*e*) 1 Inst. 319 b.

It was admitted that the remainder in fee to the husband was contingent, because he only took the particular estate for years; and the estate did not originally move from him; for if it had, the remainder limited to his right heirs would have been the old reversion. (*a*)

11. Where the subsequent *limitation is immediate*, it becomes executed in the ancestor, forming, by its union with his particular freehold, one estate of inheritance in possession. But where such *limitation is mediate*, it is then a *remainder vested in the ancestor*, who takes the freehold, not to be executed in
308 * *possession till the determination of the preceding mesne estates. But an *intervening limitation for years* will not prevent the subsequent limitation from being immediately vested. (*b*)

12. Where the *limitations intervening* between the first estate for life, and the limitations to the heirs of the body are *contingent*, the estate for life is not merged; because the intervening limitations would be thereby destroyed; but the two limitations are united, and executed in the ancestor, only till such time as the intervening limitations become vested; and then they open and become separate, in order to admit such intervening limitations when they arise. (*c*)

13. Where there is a *joint limitation of the freehold to several persons*, followed by a *joint limitation of the inheritance in fee simple to them;* as, an estate to A and B for their lives, or in tail, and afterwards to their heirs, so that both limitations are of the same quality, that is, both joint; it seems the fee vests in them jointly. And so, if the limitation of the freehold be to baron and feme jointly, remainder to the heirs of their bodies, it is an estate tail executed in them; as they are capable of issue to whom such joint inheritance can descend. But if the limitation of the freehold be not joint but successive, as to the husband for life, remainder to the wife for life, remainder to the heirs of their bodies, there it seems the ultimate limitation is not executed in possession, but gives them a joint remainder in tail. (*d*)

(*a*) Tipping's case, cited 1 P. Wms. 359.

(*b*) Fearne, Cont. Rem. 37, 38. Bates *v.* Bates, 1 Ld. Raym. 326.

(*c*) Fearne, Cont. Rem. 42. Bowle's case, tit. 16, c. 1, § 46. Meredyth *v.* Leslie, tit. 36, ch. 7, § 53.

(*d*) Fearne, Cont. Rem. [35.]

14. Sir Francis Wortley, in consideration of an intended marriage with Hester, covenanted to stand seised to the use of himself for life, remainder to Hester for life, remainder to the heirs male which he should beget upon the body of the said Hester. It was resolved, that the estate tail was not executed, because there was an intervening remainder limited to the wife. (*a*)

15. Where an estate for life is limited *to A*, with a *remainder to the heirs of A and B*, this is a contingent remainder, and not a vested estate. So if there be a limitation to the wife for life, remainder to the heirs of the body of the husband and wife; for the freehold is limited to her alone; and as the person, who is to take in remainder, must be heir of both their bodies, if the wife should die before the husband, there can be none to answer that description, when the particular estate determines; because the husband cannot have an heir during his life; nor could it be involved or flow into the limitation to the wife herself as not *being confined to her own heirs. Therefore the re- *309
mainder is in contingency. (*b*)

16. Sir R. Frank, on the marriage of his son, levied a fine, and declared the uses to himself, during the joint lives of himself and his son Leventhorp Frank; and after the decease of either of them, to the use of Susan Cotele for her life; and after her decease, to the use of the issue male of the said Susan and Leventhorp, and the heirs of their bodies; and in default of such issue, to the use of the heirs to be begotten on the body of Susan by the said Leventhorp; remainder to the right heirs of Sir R. Frank. The marriage took effect, and Susan died, leaving five daughters, but no son. Sir Richard died, leaving Leventhorp his son and heir. A question arose on the estate which Leventhorp took. The Court resolved,—I. That if he had been joint tenant with the wife for life, this had been an estate tail in both, as the word "*heirs*" is not applied to anybody particularly, as Lit. s. 28. II. That neither the husband nor wife had an estate tail; not the husband, because he had no prior estate for life; nor the wife, because, though she took an estate for life, yet the heirs were not applied to her body. III. That it was a contingent remainder, to the heirs of both their bodies. (*c*)

(*a*) Stevens *v.* Brittridge, T. Raym. 36. (*b*) Fearne, Cont. Rem. [38.]
(*c*) Gosage *v.* Taylor, cited 2 Term Rep. 435. (And see Ives *v.* Legge, 3 Term R. 488, n. Williams *v.* Williams, 12 East, 209.)

17. Where *the particular estate is granted to two persons* with a *limitation to the heirs*, or heirs of the body *of one of them*, the inheritance is executed in the person to whose heirs it is limited.

18. In a modern case, lands were conveyed by lease and release, in consideration of marriage, to John Watkins for life, remainder to Susannah Stephens his intended wife for life, for her jointure, remainder to the use of the heirs of the body of the said Susannah, by him the said John Watkins to be begotten, and of their heirs and assigns forever. Lord Kenyon said, there was no case, from Shelley's case down to that time, in which it had not been holden, that words in a deed similar to those in this deed, did not create an estate tail. If the Court were to determine otherwise, they would trench on established rules of law, and defeat the intention of the parties, in this and almost every other case. (*a*)

Mr. Fearne observes, that limitations of this kind are said to be executed *sub modo;* that is, to some purposes, though not to all; for though they are so far executed in, or blended
310* with the *possession, as not to be grantable away from, or without the freehold, by way of remainder; yet they are not so executed in possession, as to sever the jointure, or entitle the wife of the person so taking the inheritance to dower. (*b*)

19. This rule does not take place, unless the particular estate and the remainder to the heirs, or heirs of the body, are *created by the same conveyance;* for by the very words of the rule, as stated in Shelley's case, both estates must be limited by the same gift or conveyance.

20. Thus, it was determined, so long ago as in 16 Eliz., that if a lease was made to A for life, remainder to the right heirs of B, and B should purchase the estate of A, the remainder would not thereby become executed; for it was not conveyed by the original grant, but by the act of another person, after the original grant. (*c*)

21. A, on the marriage of B, his son, settled lands to the use of B for life, remainder to the wife of B for life, remainder to their first and other sons in tail, with reversion to himself in fee.

(*a*) Alpass *v.* Watkins, 8 Term R. 516.
(*b*) Fearne, Cont. Rem. [36.]
(*c*) Cranmer's case, 2 Leon. 5–7.

Afterwards A devised the same lands to such issue male as B should have by any other wife, in tail male; and in case of failure of issue male of B, to his grandchildren, by his daughter C, in fee. B suffered a recovery, and died without issue male. Lord Ch. Just. Holt held clearly, that the devise to B's issue male by any other wife, could not be tacked to his estate for life, because that was limited by another conveyance. (*a*)

Lord K. Wright, [after observing that he doubted, in the case before him, whether the estate for life, limited by one deed, did not consolidate with a limitation to the heirs of the body of the tenant for life, by another deed,] is reported to have said, that all the authorities were only in the affirmative, that if by the same deed, the estates should consolidate; not negatively, that if by different deeds, they should not. This point, however, is now fully settled. (*b*)

22. Claude Fonnereau, by indenture made between him and his eldest son Thomas, in consideration of natural love and affection, granted an estate to Thomas for life; afterwards the father, by his will, devised the reversion to the heirs male of the body of Thomas. Lord Mansfield said, the Court was unanimous in thinking that the estate for life being by one instrument, and the limitation in tail by another, they could not unite. (*c*)

*23. There is, however, *an exception to this rule;* for *311 where an estate is limited to A for life, by deed, and a *limitation is afterwards made in A's lifetime, to his heirs, by an execution of a power contained in the same deed,* there Mr. Fearne was of opinion that the limitations would unite; because the limitation of a use under the execution of a power operated as a use created by, and arising under, that conveyance itself; and of course was the subject of the same construction, so far as the time of its taking effect admitted, as it would have been if expressly specified and ascertained in the original deed. (*d*)

24. By a settlement made after marriage, lands were limited to [the use of] S. Morris for life, [remainder to the use of trustees and their heirs, for the life of S. Morris, to preserve contingent remainders,] remainder to the use of Hannah Morris, his

(*a*) Moore *v.* Parker, 1 Ld. Raym. 87. Fearne, Cont. Rem. [71.]
(*b*) 2 Vern. 486. (*c*) Doe *v.* Fonnereau, 2 Doug. 487, 510. (*d*) Fearne, Cont. Rem. 74.

wife for life, remainder to [the use of the same] trustees *and their heirs*, [generally,] to preserve contingent remainders; and after the several deceases of S. Morris and his wife, to the first and other sons of the marriage severally in tail, remainder to the use of the first and other daughters successively in tail, remainder to the use of the said Hannah Morris, and the heirs of her body; and for default of such issue, to the use of such person or persons as Hannah should at any time, notwithstanding her coverture, by any deed limit or appoint. Hannah Morris, by a deed poll duly executed, reciting her power, and that she was desirous to limit the reversion of the said premises, in default of any issue of her body, appointed the premises to the use of the right heirs of S. Morris forever. (*a*)

The question was, whether the heirs of S. Morris took an estate under this appointment; and it was contended, on behalf of the heir of S. Morris, to be a general rule, that an appointment in pursuance of a power, created by a former deed, when executed, was to be taken as if it were inserted in the original deed, and was supplementary to it; in which case the appointment of the ultimate remainder to the heirs of S. Morris, must have the same construction, as if the limitation had been inserted in the antecedent deed; and then, according to the rule in Shelley's case, this would operate to give an estate in fee to S. Morris, from whom the defendant (the heir of S. Morris,) would claim by descent. The Court appears to have assented to this argument, for Lord Kenyon said,—"If the limitation to
312* the heirs *of S. Morris be a legal estate, it enlarged the estate in the ancestor, and gave him a fee." But the Court being of opinion that the appointment did not create a legal estate, certified upon another ground. (*b*)

25. The estate for life, and the subsequent limitation, *must be of the same nature;* that is, *both legal* or *both equitable;* for if the first limitation be of a trust estate of freehold, and the subsequent one carries the legal estate, the rule will not take place.

26. Thus, in the case of Lord Say and Sele *v.* Jones, where a trust estate was devised to a woman for life, and a legal remain-

(*a*) Venables *v.* Morris, 7 Term Rep. 342, 438.
(*b*) See Fearne, Cont. Rem. 60, n., ed. 8.

der "*to the heirs of her body*," it was held that the heirs of her body must take by purchase; there being no instance where the legal limitation of an estate to the heirs of the body of any person, had been united to a prior limitation of the surplus profits of such estate to the same person for life, so as to make such person tenant in tail by construction of law. (*a*)

27. It is the same, where a person takes a legal estate for life, with a limitation of the equitable estate to his heirs. For in the case of Venables *v.* Morris, the Court of King's Bench held, that as S. Morris took a legal estate for life, and the limitation to his heirs only carried an equitable estate, the two estates did not unite.

28. As one of the principal reasons for establishing this rule was to prevent the abeyance or suspension of the inheritance, it is *only applied to those limitations in which the word "heirs" is used*, on account of the maxim that *nemo est hæres viventis.* So that if lands are limited to A for life, remainder to his first and other "*sons*," and the heirs of their bodies; or remainder to the "*child*" or "*children*" of A, or to the "*issue*" of A, and the heirs of his or their bodies, no more than an estate for life will vest in A, and the words, *son*, *child*, or *issue*, will be construed words of purchase, and give a vested remainder.

29. The word "*heir*" in the singular number, with words of limitation superadded, is a *word of purchase* in a *deed;* because it is construed as a description of the person intended to take.

30. A fine was levied by A to the use of himself for life, remainder to his first son and the heirs male of his body begotten, &c., and so on to his sixth son successively, remainder to the right heir male (in the singular number) of the conusor, *to be begotten after the said sixth son, and of *313 his heirs male. It was ruled, upon evidence at bar, that this limitation to the heir male was only a contingent remainder, and not an estate tail in A, because it was limited to particular persons. (*b*)

31. By indenture made in consideration of marriage, a sum of money was directed to be laid out in lands, to be settled to the husband for life, remainder to the wife for life, remainder to the

(*a*) Tit. 12, c. 1, § 19. 8 Bro. Parl. Ca. 113. 3 Yo. & Jer. 175.
(*b*) Walker *v.* Snowe, Palm 359.

heir male of the body of the wife begotten by the husband, and to the heirs or executors of such heir male. It was resolved, that this was a contingent remainder in fee to such person as should be heir male of the body of the wife at her death. (*a*)

32. *This rule is not adopted in the construction of marriage articles*, because they are considered in equity as executory. and to be construed according to the intention of the parties. And a provision for the issue of the marriage being one of the principal objects of such agreements, the intention of the parties, however untechnically expressed, must be to make such a settlement as shall contain an effectual provision for that issue, who are generally purchasers for a valuable consideration, and whose rights ought to be protected. Therefore, in marriage articles, where it is agreed to settle lands to the husband for life, with remainder to the heirs of his body, by his intended wife; these last words are construed to be words of purchase, and to mean the first and other sons of the marriage, and the heirs of their bodies; for otherwise the husband would be tenant in tail, and might suffer a recovery, whereby the provision intended for the children of the marriage would be defeated.

33. Sir John Trevor, by articles in consideration of his intended marriage with Jane Pulestone, covenanted with trustees to convey and assure to them and their heirs certain estates, to the use of himself for life, without impeachment of waste, remainder to his intended wife for her life, remainder to the use of the heirs male of his body, on her body to be begotten, and the heirs male of such heirs male lawfully issuing; with remainder to the use of his own right heirs; and covenanted, that the said premises should remain to his intended wife during her life, after his own decease, free from all incumbrances; and that in case the said uses and limitations in the said articles were not thereafter well raised, according to the true intent and mean-
314 * ing * of the articles, then he and his heirs should stand and be seised of the said premises, until such time as a further assurance should be thereof made, to the uses of the said articles. (*b*)

The marriage took effect, and there was issue an eldest son,

(*a*) Bayley *v.* Morris, 4 Ves. 788.
(*b*) Trevor *v.* Trevor, 1 Ab. Eq. 387. 5 Bro. Parl. Ca. 122.

and several other children. No settlement was ever made pursuant to these articles; but the eldest son having incurred his father's displeasure, by an improvident marriage, Sir John Trevor, apprehending that he had an estate tail vested in him, which it was in his power to bar, levied a fine of the premises, and settled them on his second son. Upon the death of Sir John Trevor, his eldest son filed his bill in the Court of Chancery, praying a specific performance of his father's marriage articles, and to have a conveyance made according to the intention thereof; insisting that those articles were only an executory agreement, for a further settlement of the premises; and that it was not in the power of his father to bar the limitations thereof. The cause was heard before Lord Chancellor Parker, who said, the case ought to be considered as if the bill had been brought within two years after the making of the articles; if a bill had been then brought, there could have been no doubt but that a settlement must have been decreed pursuant to the intention of the articles. Upon articles, the case was stronger than on a will. Articles were only minutes or heads of the agreement of the parties, and ought to be so modelled, when they come to be carried into execution, as make them effectual. The intention of the parties was only to give Sir John Trevor an estate for life; if it were otherwise, it would have been vain and ineffectual; as it would have been in his power, as soon as the articles were made, to have destroyed them. Then the consideration of love and affection which he had to his intended wife, and the heirs male of their two bodies, would have run thus: that he did, in consideration thereof, settle an estate on himself, which he might give away from his heirs male whenever he thought fit. This limitation, to the heirs male of his body, was in effect but a limitation to his first and other sons; and if the articles had been so penned, would not the Court of Chancery have decreed a limitation to trustees to preserve them? It was declared, that Sir John Trevor took only an estate for life, under these articles; and that the remainder to the heirs male of his body, &c., gave an estate tail, by *purchase, to the first and other sons of the marriage. *315 And it was decreed, that the lands should be conveyed to the eldest son in tail male, remainder to the other sons in the same manner.

On an appeal from this decree to the House of Lords, Mr. Peere Williams, who was counsel for the appellant, says, 316 * * the matter was greatly debated by the Lord Chancellor and Lord Nottingham for the decree, and the Lords Trevor and Harcourt against it; but at length the decree was affirmed without any division.

34. Thomas Streatfield, by articles previous to his marriage, agreed to settle lands to the use of himself and Martha his intended wife, for their lives, and the life of the survivor; and after the survivor's decease, to the use of the heirs of the body of him the said Thomas, on his wife begotten, with other remainders over. The marriage soon after took effect, and the husband by deed, reciting the articles, settled the lands to the use of himself and his wife for their lives, and the life of the longest liver of them, and after their decease, to the use of the heirs of the body of the said Thomas on the said Martha to be begotten, and for want of such issue, remainder to the right heirs of Thomas. The question was, whether this settlement was a proper execution of the articles. Lord Talbot held, that the settlement was not a proper execution of the articles. He said, it could not be doubted but that, upon application to the Court of Chancery, for the carrying into execution the articles, the Court would have decreed it be done in the strictest manner; and would never leave it in the husband's power, to defeat and annul every thing he had been doing; and the nature of the provision was strong enough for that purpose, without any express words. (*a*)

35. The same rule has been adopted in the construction of articles for settling the wife's estate; in which the words, "*heirs of the body of the wife, by the intended husband,*" have been construed to mean first and other sons.

36. Upon a marriage, articles were entered into, whereby it was agreed, that the wife's portion should be laid out in the purchase of lands, which should be settled on the husband and wife, for their lives, and the life of the longer liver of them; and after, to the heirs of the body of the wife, by the husband to be begotten. Yet the Master of the Rolls (Sir J. Trevor) decreed the

(*a*) Streatfield *v.* Streatfield, MSS. R. 176. Ca. Tem. Talb. 176. Cusack *v.* Cusack, 5 Bro. Parl. Ca. 116.

settlement to be to the first and other sons, &c., so as the husband and wife might not have power to bar the issue. (*a*)

37. Mr. Fearne observes, that in the above cases, the limitation in the articles importing an estate tail, either in that parent from whom the estate moved, or in both the parents, would have *put it in the power either of the father alone, *317 during the coverture, or of the settling parent alone, after the death of the other, to bar the issue; and that power would not have been restrained to the concurrence of both parents. But he had not met with any case, in which the same doctrine had been extended to a limitation giving an estate tail to the wife alone, in the estate moving from the husband. There rather seemed to have been a distinction taken between that and the other cases, in respect of its not leaving it in the power of either of the parents, alone, to bar the issue, either during or after the coverture; for in such case, as the husband takes no estate tail, it is evident he cannot during the coverture, or afterwards, bar the issue of the marriage; and the wife of course cannot, during the coverture, do it, without his concurrence; and her estate tail being *ex provisione viri*, the statute 11 Hen. VII., c. 20, prevents her from doing it afterwards; and it has been held, that their power of doing it jointly is not unreasonable, or inconsistent with the probable view and intent of the settlement. (*b*)

38. Thus, where articles were made before and in consideration of marriage, whereby lands were agreed to be settled to the use of the husband for life, remainder to the wife for life, remainder to the heirs of the body of the wife, by the husband begotten, remainder to the husband in fee; Lord Cowper said, they were prudent articles; and the wife, though she was to have an estate tail thereby, yet could not bar it, she being restrained by the statute 11 Henry VII.; and it was plainly intended that the father should not have a power of defeating and starving the issue. It was therefore decreed, that the estate should be settled as by the articles, namely, to the father for life, remainder to the eldest son in tail. (*c*)

39. On a bill by a mortgagee, to redeem or foreclose, the de-

(*a*) Jones *v.* Langhton, 1 Ab. Eq. 392.
(*b*) Fearne, Cont. Rem. 94, ed. 8. *Vide*, tit. 36, c. 10.
(*c*) Honor *v.* Honor, 1 P. Wms. 123.

fendant insisted that by articles, previous to the marriage of his father and mother, they agreed to purchase lands of a certain value, and to settle them to the use of the husband for life, remainder to the wife for life, remainder to the use of the heirs of the body of the wife by the husband, remainder to the heirs of the survivor. Lands were purchased, and the husband and wife joined in a recovery of them, to the use of the plaintiff in fee, by way of mortgage. The defendant insisted, that his mother being dead, he was entitled, under the true construction of these 318* articles, *in equity, to have this estate settled to the first and other sons of the marriage in tail male. Sir Joseph Jekyll held, that if this was a common limitation, he should have thought what the defendant insisted on right, and that the mortgagee must have lost his estate; but this was particular, to the heirs of the body of the wife by the husband; and being *ex provisione viri*, would secure the children against the father alone; and that it might be the real intent that both might bar, and therefore the defendant was well barred. (*a*)

40. Francis Highway, by articles previous to his marriage, covenanted to surrender customary lands of inheritance, to the use of himself for life, remainder to his intended wife for life, and from and after the decease of the husband and wife, to the use of the heirs of her body by him, if he survived her; but if she survived him, to the heirs of his body, on her body to be begotten; remainder to his own right heirs. The marriage took effect, and the husband surrendered the estate to the uses mentioned in the marriage articles, and was admitted accordingly; and, at the same Court, he and his wife surrendered the estate to the use of the husband and wife for their joint lives, and the life of the survivor, and after their deaths, to the use of their eldest son for life, and after his death, to his first son who should live to attain twenty-one, and his heirs forever. (*b*)

Upon a question, whether the first surrender to the uses mentioned in the articles was a due execution of them, the Master of the Rolls (Sir L. Kenyon) said, it had been long settled, that articles for a settlement on a husband, and the heirs of his body, should be carried into execution as a strict settlement; and it had been considered as vain to make a settlement, which in-

(*a*) Whateley *v.* Kemp, cited 2 Ves. 358. 3 Atk. 292.
(*b*) Highway *v.* Banner, 1 Bro. C. C. 584, 2d edit.

stantly might be defeated by a recovery. But the doctrine had never gone so far, where that party could not suffer a recovery alone. He said he did not know that the point had been decided; he must therefore decide as reason, and the principles of the cases decided, led him. He observed that it was anciently a common mode of settlement, to the husband for life, to the wife for life, and to the heirs of the body of the wife by the husband; it was thought a sufficient precaution, to preserve the entail, that it could not be destroyed, unless both husband and wife concurred; and it was thought better that the power should be given to the two parents concurring, than that the property should * be absolutely tied up. With respect to * 319 the case before him, the limitation appeared to be anxiously worded; the concurrence of both parties was necessary to destroy the entail; whichever survived, it was out of the power of the survivor. He thought he had no authority to say, that this was not what the parties meant; that he could not put on the articles the construction contended for by the defendants; and declared, that the articles were properly carried into execution by the first surrender. (*a*)

41. Where there has been a difference between two sets of limitations on the face of the articles, that evidenced a distinction in the intention of the parties themselves, between a strict settlement on the issue of the marriage, and an entail on the parent; by expressly securing a provision for such issue, under a limitation of one fund or estate in the way of strict settlement; and at the same time limiting another estate in a more general way to the heirs of the body of the father; the Court has thought that there was not sufficient ground for executing the latter limitation in strict settlement. (*b*)

42. By marriage articles, it was agreed, that £6000 in the hands of trustees, should be laid out in the purchase of lands, to be settled on the husband for life, remainder to the wife for life, for her jointure, remainder to the first and other sons of that marriage in tail male successively, chargeable with £2000 for younger children, remainder to the husband in fee. The father of the husband, by the same articles, covenanted to settle other lands, after his own decease, upon the husband and the heirs

(*a*) 7 Ves. 390. (*b*) Fearne, Cont. Rem. [96.]

male of his body, remainder to the heirs of his father. The husband's father having made a settlement of the lands, agreed to be settled by the articles, on the husband and the heirs male of his body, with remainder to himself in fee, one point was, whether this was a good performance of the agreement, and if the limitation ought not to have been to the husband for life, with remainder to his first and other sons in tail male successively, in strict settlement. (*a*)

Lord King held, that the settlement made by the father was a good execution of the agreement, and confirmed it. He said, that by the articles, these lands were not intended to be settled as a provision for the children of that marriage, (they were taken care of by the other part of the articles, by the trust
320* money,) but * for the support and provision of the husband; and it was not like the common case of articles for a settlement on the marriage, where no other provision or care was taken for them; and the different manner of penning the articles, in relation to the trust money, and to these lands, the one to be in settlement, to the first and other sons of the marriage, the other limitation to the husband and the heirs male of his body generally, and not tied up to the issue of that marriage; showed plainly the parties understood and had in contemplation the difference between a strict settlement upon the issue of that marriage, and a general settlement upon the husband and the heirs male of his body. (*b*)

43. The Court of Chancery will put the same construction on the words "*heirs female*," in favor of daughters, as it does on the words "*heirs male*," in favor of sons.

44. By articles, in consideration of an intended marriage, it was agreed that the husband should settle his estate, to the use of himself for life, without impeachment of waste, remainder to the intended wife for life, remainder to the heirs male of the husband by the said intended wife, remainder to the heirs male of the husband by any other wife, remainder to the heirs female of the husband. The marriage took effect, and there was issue one daughter. The husband suffered a recovery, and sold the lands. Upon a bill by the two daughters of the daughter, they

(*a*) Chambers *v.* Chambers, 2 Ab. Eq. 35.
(*b*) Howel *v.* Howel, 2 Vez. 358.

insisted that the estate ought to have been limited in strict settlement, to the sons of the husband, with remainder to the daughters of the marriage. The bill was dismissed. (*a*)

An appeal was brought in the House of Lords, where * the decree was reversed, and it was ordered and adjudged * 321 that the lands contained in the marriage articles should be conveyed to the two granddaughters, and to the heirs of their bodies, as tenants in common, with cross remainders.

45. In a subsequent case, a limitation to the heirs of the body of the husband, with an express pecuniary provision for the daughters, was held not to be equivalent to a limitation to heirs female. (*b*)

46. Thus, in consideration of a marriage, and of £5000 portion, articles were entered into, whereby the intended husband, for making provision for the issue of that marriage, covenanted with the wife's trustees to convey certain estates to the use of himself for life, without waste, remainder to trustees, to preserve contingent remainders; remainder, as to part, to the wife for her jointure; remainder, as to the whole, to the first and other sons of the marriage, in tail male successively; remainder to the heirs male of the body of the husband, (that is, by any wife); remainder to the heirs of his body by his said wife; and for want of such issue, to his own right heirs; in which articles there was a clause, empowering the husband and wife to make leases at the old rent; and also a clause that, if the husband should die without issue male by his said wife, and there should * be daughters, if but one daughter, then such * 322 daughter should have £3000, and if more daughters than one, £4000 among them, to be secured upon some part of the estate. There was but one daughter of the marriage. The husband survived his wife, and suffered a recovery of the lands; and made another settlement of them on his second marriage, subject, as to part, to a trust for raising £3000 for his daughter by his first wife, in satisfaction of the portion she was entitled to under the first articles, and maintenance for her in the mean time. The question was, whether this, being a case of articles, should not be taken as if the limitation had been to the daughters of the

(*a*) West *v.* Errissey, 2 P. Wms. 349. 1 Bro. Parl. Ca. 225.
(*b*) 2 Vez. 239.

husband, by his first wife; for then they could not be barred by the recovery. (*a*)

It was insisted, on behalf of the daughter, that the issue of the marriage, and consequently the daughter, were purchasers, in consideration of the marriage and the mother's portion. That the limitation to the heirs of the body of the husband, by his first wife, being by way of articles, must be the same as if it had been to the daughters; for it could not be intended in favor of the sons of that marriage, there being an express limitation before to them; and though, if this had been in a settlement, there being a precedent limitation for life to the husband, it would have been an estate tail in him, and barrable by a common recovery, yet it was otherwise where it rested upon articles; for in that case, an express estate for life being limited to the husband, as in this case, such express estate excluded the raising or vesting of any different estate in him, by virtue of any limitation to the heirs of his body. On the other side, it was said and *resolved*, that, though here was notice of the marriage articles, yet the £3000, secured by the settlement on the second marriage, was an actual satisfaction of all demands by these articles; and though a limitation by articles to the heirs male of the marriage, after an express estate for life to the father, should be taken to mean a remainder to the first and other sons, it did not follow that such a limitation to the heirs of the body, must be equivalent to a remainder limited to daughters, especially in this case, where they were postponed to the limitation to the heirs male of the body of the husband, by any wife, and where there was an express pecuniary provision made for the daughters by the first wife, which was all the said daughters were to depend
323* upon. *As to the case of West *v.* Errissey, there was this diversity. In that case, no portion was provided for the daughters of the first marriage; in the present case, portions in all events were secured to such daughters. In West *v.* Errissey, the remainder was to the heirs female of the body of the husband by the first wife, so that the daughters were more immediately in the view and contemplation of the parties in that than in the present case. It was decreed that the daughter was not entitled to the premises, by virtue of the limitation in the

(*a*) Powell *v.* Price, 2 P. Wms. 536.

marriage articles, to the heirs of the body of the husband, by the first wife. (*a*)

47. As the word "*issue*" equally comprehends male and female children, an agreement to settle lands on the issue of the marriage, has been held to extend to daughters.

48. By articles in consideration of marriage, the intended husband covenanted to convey lands to trustees, in trust for himself for life, remainder to his wife for life; and after the determination of these estates, then to the issue of this match, in such sort, manner, and form, and subject to such charges for younger children, as the husband should thereafter, by deed or will, appoint. Lord Hardwicke said, the word "*issue*" meant issue female as well as male; and, therefore, if it had gone no further than to the issue of the marriage, and a bill had been brought for carrying the articles into execution, the settlement must have been to all the issue; to the first and every other son; and for default of such issue, to the daughters, with proper remainders following one after another. He had known several decrees of this kind upon the words, "*issue of the marriage.*" But then the subsequent words, "In such sort, manner, and form, and subject to such charges for the younger children, as the husband should thereafter, by deed or will, order and appoint," were relied on by the defendant; and it had been insisted that this left a power in the father, as to the manner and quantity of interest the children should take out of the estate. He agreed that it did as to the manner, but not as to the interest. (*b*)

49. In the preceding cases, there were articles only, and no settlement previous to the marriage, and the Court was required to carry the articles into execution, or to rectify the settlement made after the marriage, in consequence of the articles. But there are also instances where there were both articles and a settlement expressly in pursuance thereof, made previous to *the marriage; and the Court, upon an application for *324 that purpose, has interfered to *rectify such settlement, in conformity with the nature or constructive import of the limitations in the articles.*

50. Thus, in the case of Honor *v.* Honor, a settlement was

(*a*) *Ante*, s. 44. *Vide* Fearne, Cont. Rem. [103,] ed. 8.
(*b*) Hart *v.* Middlehurst, 3 Atk. 371. Dod *v.* Dod, Amb. 274. *Vide* Fearne, [106.]

made before the marriage, reciting the articles, and expressed to be made in pursuance thereof, whereby the lands were limited to the husband for life, remainder to the wife for life, remainder to the heirs of the body of the husband, on the wife to be begotten. Lord Cowper said, it was a plain mistake, in making the settlement vary from the articles; for the settlement being said to be made in pursuance thereto, showed there was no alteration of the intention, nor any new agreement between the making of the articles and the settlement. Therefore, he decreed a conveyance of the lands to the father for life, remainder to the plaintiff, the son, in tail. (*a*)

51. So, in the case of West *v.* Errissey, a settlement was made before the marriage, mentioned to be in pursuance and performance of the articles, by which, after the limitation to the first and other sons of the husband by any other wife, the lands were limited to the heirs of the body of the husband by the wife. And it was ordered, by the House of Lords, that the lands should be conveyed to the granddaughters, in the manner already stated. (*b*)

52. By articles before marriage, an estate was agreed to be settled on the husband for life, remainder to the heirs male of his body, with power to raise portions for younger children. A settlement was afterwards made, also before marriage, in pursuance of the articles; and observing the very words of the articles. The husband levied a fine, and declared the uses to himself in fee. The son brought a bill to have the settlement rectified, according to the intention of the articles, which was to make his father tenant for life only, although the words both of the articles and settlement, in construction of law, made him tenant in tail. Before marriage, indeed, the parties might come to a new agreement, but the settlement itself being in pursuance of the articles, excluded any such notion. (*c*)

Lord Hardwicke said: This was the common case, the variation from the intent of the articles, and from the ordinary course of settlements, not arising from any new agreement (be-
325* ing made *in pursuance of the articles,) or fraud; but from mistake in not attending to a strict settlement; the reason of which was unanswerable, viz., that on a settlement for

(*a*) *Ante*, s. 38. (*b*) *Ante*, s. 44. (*c*) Roberts *v.* Kingsly, 1 Ves. 238.

valuable consideration, to make the father tenant in tail, would be nugatory, and the same as making him tenant in fee; therefore the son was entitled to relief, and to have the settlement rectified according to the true intent of the articles.

53. But where both articles and settlement are previous to marriage, at a time when all parties are at liberty, and the settlement is not expressed to be made in pursuance and performance of the articles; there, if the settlement differs from the articles, it will be considered as a new agreement between the parties, and will control the articles. (*a*)

54. It should, however, be observed, that the *Court of Chancery will not*, in those cases, *relieve against purchasers for a valuable consideration, and without notice.* As in the case of West *v.* Errissey, where one of the objections to the appeal was, that if the articles should be allowed to control the settlement, the purchasers under the husband would be affected. To which it was answered, that the appellant's bill was not brought against any purchaser, as to the parts of the estate sold by the husband; since the appellant only prayed satisfaction out of his personal estate; and the decree was according to such prayer, and did not affect the purchasers. (*b*)

55. So in the case of Powell *v.* Price, it was admitted, that if the trustees under the settlement, or the second wife, had had no notice of the articles made on the first marriage, then their being purchasers, without notice, would have been a bar to the plaintiff's claim, by the articles. (*c*)

56. [It would seem that *freeholds pour autre vie* are subject to the operation of the rule in Shelley's case.] †

57. This rule does not appear to have been *formerly* applied in the construction of assignments of terms for years; for in the early cases, the words "*heirs of the body*" appear to have been considered as *words of purchase.* (*d*)

58. The trust of a term for years was limited upon a marriage to A, the husband, for life, then to B, the wife, for life, and then

(*a*) Legg *v.* Goldwire, Forest, R. 20. (*b*) *Ante*, s. 44.
(*c*) *Ante*, s. 46. Warrick *v.* Warrick, 3 Atk. 291. Cordwell *v.* Mackrill, 2 Eden, 344.
(*d*) Fearne, Ex. Dev. 490, 8th ed. (But see *post*, § 61.)

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† Low *v.* Burron, 3 P. Will. 263. *Ex parte* Sterne, 6 Ves. 156.

to the heirs of the body of the wife, by the husband to
326* be begotten. * Lord Chancellor Jeffries decreed, that the whole vested in the wife. Afterwards, the Lords Commissioners, Trevor, Rawlinson, and Hutchins, resolved, that the issue should have it; for to support the intent of the settlement, they would take the words "*heirs of the body*" to be *descriptio personæ*, and not words of limitation; which was affirmed by the House of Lords. (*a*)

59. A termor for years, by settlement on his marriage, assigned his term to trustees, in trust for himself for life, remainder to his wife for life, remainder of one moiety to the heirs of the body of the wife by the husband, remainder, as to the other moiety, to the children of the body of the wife. The husband died, leaving a son of that marriage. The wife married again, and had a son by the second husband. Upon a question whether the whole interest, in the first moiety of the term, vested in the wife, Lord Somers held, that the case of Peacock *v.* Spooner having been decided by the House of Lords, must govern this case. There the like limitation to the heirs of the body of the wife, by the husband to be begotten, was adjudged to be taken as words of purchase, and not as words of limitation. (*b*)

60. So, where A, possessed for two thousand years of a tenement, in consideration of a marriage, and of £350 portion, and for provision and stay of living of the husband and wife, and their children, demised to trustees for seventeen hundred years, if he and his wife, or any of their issue, should live so long, in trust for the husband for ninety-nine years, remainder to the heirs of the body of A by that wife. They had issue three daughters, two of whom got an assignment of the whole term, and had administration to the father. And the question was, whether the third daughter was entitled to a third with her sisters? for though it was insisted for the administratrix, that the trust of the whole term vested in the father, and was executed in him, and that the daughters, though the heirs of his body, could not take by purchase in this case; yet the Master of the Rolls (Sir John Trevor) conceived, that inasmuch as there was a particular term of ninety-nine years taken out of the seventeen hundred, and the father had a particular estate limited to him during

(*a*) Peacock *v.* Spooner, 2 Vern. 43, 195. 2 Freem. 114. 1 P. Wms. 133. 2 Atk. 73.
(*b*) Dafforne *v.* Goodman, 2 Vern. 362. 1 P. Wms. 372.

ninety-nine years, the trust of the whole term during the seventeen hundred years, was not executed to the father. And his Honor said, that the construction of trusts must be *327 governed by intention; and this being the case of a marriage settlement, and the intention plain, it ought to be supported. And his Honor did conceive in this case, that though the word "*heirs*" was not properly a word of purchase, yet there being a particular estate for life, during a particular term, limited to the father, the limitation to the heirs of his body afterwards, on that marriage, would carry it to all the daughters equally; and he was the more of that opinion, because it was declared in the deed, that, after the death of the father, the trustees should execute estates to the person and persons respectively, that should be interested, according to their respective shares therein; which showed that the children should all take their several shares. (*a*)

61. Mr. Fearne observes, that in the cases of Peacock *v.* Spooner, and Dafforne *v.* Goodman, no particular expressions determined the intent to be that the heirs of the body should take as purchasers. But these being cases of marriage settlement, it was reasonably enough inferred, that the issue of the marriage were intended objects of the settlement, and the term not designed to vest wholly in the mother. But in *subsequent cases*, the words "*heirs of the body*" were held to be *words of limitation.* (*b*)

62. Edward Webb, the defendant's grandfather, in consideration of a marriage between Thomas, his son, and Ann, his then wife, and £350 portion, assigned divers lands to trustees for the remainder of a term of one thousand years, upon trust, to permit the son to enjoy the same so long as he should live, and after his decease, then to Ann, his wife, as long as she should live, and after their decease, to permit the heirs of the bodies of the said Thomas, the son, and Ann, his wife, to be begotten, to hold the premises during the remainder of the term; and for want of such issue, to be enjoyed by the right heirs of the said Thomas, the son. Thomas and Ann had several children; and he having survived his wife, and settled about two thirds of his estate on the defendant, his eldest son, and being indebted about £300,

(*a*) Ward *v.* Bradley, 2 Vern. 23. 1 P. Wms. 134.
(*b*) Fearne, Ex. Dev. 492, 8th ed.

made a mortgage of the premises for securing that money; and in order thereunto, took out administration to the surviving trustee, and afterwards assigned the term to the plaintiffs, upon trust to sell the same, and pay off the mortgage. The plaintiffs, the trustees, being disturbed by the defendant, (the eldest 328* son,) *brought their bill for the execution of the said trust. The defendant, by his answer, set forth the first deed of trust, and insisted that he, as eldest son and heir of his father and mother, was entitled to the premises, by virtue of that settlement. The cause was heard before the Master of the Rolls, (Sir John Trevor,) who dismissed the plaintiff's bill. (*a*)

Upon a petition to Lord Keeper Harcourt, it was reheard by him; he said he never heard, before the case of Peacock *v.* Spooner, that the limitations of a term in equity differed from the case of a freehold at common law; and as that case differed from this in several material circumstances, he thought himself at liberty to determine this as if the case of Peacock *v.* Spooner was out of the way; and reversed the decree. (*b*)

63. A term was vested in trustees, by a voluntary deed, in trust, to pay the profits to Sarah Sharp during her life, and immediately after her decease, to the heirs of the body of Sarah, lawfully to be begotten, if the term should so long endure; and for default of such issue, to the granddaughter of the settlor. Lord Hardwicke was of opinion that the whole trust of the term vested in Sarah Sharp. (*c*)

64. Notwithstanding the authority of the two preceding cases, there have been *other determinations*, in which the Court of Chancery, *proceeding entirely upon circumstances of evidence of intention*, have held the words, "*heirs of the body*," to be *words of purchase.*

65. Edward Bussey, being possessed of a term for fifty-nine years by voluntary deed, conveyed it to trustees, in trust to permit Grace Bussey, his wife, to receive the rents and profits for the said term of fifty-nine years, if she should so long live, and after her decease, to the use of the said Edward for life, and after the decease of Edward and Grace, then in trust for the heirs of the body of the said Grace by the said Edward, and to

(*a*) Webb *v.* Webb, 1 P. Wms. 132.
(*b*) Hayter *v.* Rod, tit. 8, c. 2.
(*c*) Theebridge *v.* Kilburne, 2 Vez. 233.

their executors, administrators, and assigns, for the residue of the said term; and for want of such issue, &c. Lord Hardwicke was of opinion, that the whole did not vest in Grace, the words not being words of limitation, but of purchase; and that they might, from the circumstances of the case, be considered as words of purchase, appeared from Archer's case, where the superadded words of limitation made the word "*heir*" a word of purchase. (*a*)

*66. A person, on his marriage, settled a leasehold estate *329
to trustees, to the sole and separate use of his intended wife for life, for her jointure; and from and after her decease, to the use of the heirs of the body of the wife, by the husband to be begotten; and for want of such issue, to the use of the husband and his heirs forever. Sir Joseph Jekyll held, that on the wife's death, the leasehold vested in the heirs of her body, as purchasers. (*b*)

(*a*) Hodgeson *v.* Bussey, 2 Atk. 89. Tit. 35, c. 14.
(*b*) Price *v.* Price, 2 Vez. 284. Sands *v.* Dixwell, cited 2 Vez. 652.

CHAP. XXIV.

CONSTRUCTION — PERPETUITIES.

SECT. 1. *Perpetuities discouraged.*
6. *History of Settlements.*
10. *Settlements of Estates for Life.*
11. *Settlements of Estates for Years.*
17. *Alienation may be restrained during Lives in being, and twenty-one years after.*
24. *This rule applied to springing and shifting Uses.*
27. *And to Uses arising from Appointments.*
SECT. 29. *And to Declarations of Trust of Terms for Years.*
30. *But not to Remainders after Estates tail.*
32. *An unborn Person may be made Tenant for Life.*
34. *And a vested Remainder limited on that Estate.*
35. *But no Estate can be limited to the Issue of an unborn Person.*
36. *Perpetuities created by Act of Parliament.*

SECTION 1. We have seen that, by the introduction of the feudal law into England, all real property was rendered unalienable, but that by degrees the proprietors of land acquired a power of alienation, which was found to be so beneficial to the country, that the Judges of the Courts of Common Law have, for many centuries, established it as a *rule*, that real property shall in no case be rendered perpetually unalienable by the act of the proprietors; or, as it is usually expressed, that *perpetuities shall not be allowed.* And this rule, being founded on principles of general policy, is adopted by the *courts of equity* in as full an extent as by the *courts of law.* (*a*)

2. Thus, it has been stated, that a *power of alienation* is an incident so inseparably annexed to an estate in fee simple, that it cannot in general be restrained by any proviso or condition whatever. (*b*)

3. The Statute *De Donis* was procured by the nobility, for the purpose of rendering their possessions unalienable. But the Judges, by supporting common recoveries, and by their 331 * construction * of the Statute of Fines, effectually defeated

(*a*) Lit. s. 720, 3 Cha. Ca. 31. 1 Vern. 164.

(*b*) Tit. 1, § 52, tit. 13, c. 1.

the intent and operation of this statute; and also laid it down as a rule, that a tenant in tail cannot be restrained from barring his issue, or his estate tail, by those assurances. (*a*)

4. Any other mode of restraining a tenant in tail from alienation, will also be deemed void, as tending to a perpetuity.

5. Lands were limited by deed to trustees and their heirs, to hold to the use of them, their heirs and assigns forever, in trust to the use of Charles Mainwaring (the settlor) for life, and after his decease, to the use of trustees for 1000 years, subject to the uses, trusts, and conditions after-mentioned; and after the determination of that term, to the use of Sir H. Mainwaring for 99 years, if he should so long live; and after the determination of that estate, to trustees during his life, to preserve contingent remainders; remainder to his first and other sons in tail male; with several remainders over; with a declaration that the term of 1000 years was so limited, to the intent and purpose, that all and every the person and persons, other than Charles Mainwaring, on or to whom any estate or interest in the said premises was thereby before settled or intended, might be content to accept the same in such manner as the same was in and by the said indenture before limited and appointed; and that it should not be in the power of them or any of them to anticipate, prevent, or destroy the trust estate or benefit of him or them appointed to succeed. And it was declared, that the trustees, their executors, &c., should or might, after any contract or agreement made touching alienation of the said premises, or any part thereof, but before any alienation should be actually made, or any act, matter or thing done which might amount or be construed to prevent the said premises, or the trust thereof, from going, remaining, coming, or being according to the limitations aforesaid, by sale or mortgage of all the said premises, for and during the remainder of so much of the same term as should be then to come, or of a competent part thereof, raise the sum of £5000, &c., and pay the same unto such person or persons respectively as would from time to time be entitled to the premises, in case such person or persons, contracting to aliene the premises, were actually dead. (*b*)

A person, who was tenant in tail under this settlement, having

(*a*) Tit. 2, c. 1. Tit. 35, 36.

(*b*) Mainwaring *v.* Baxter, 5 Ves. 458.

suffered an equitable recovery, to the use of himself and his heirs, filed his bill in Chancery, praying that he might be de-
332* clared *entitled to the legal estate, discharged of the trusts of the term, and a conveyance thereof.

The Master of the Rolls, (Sir R. P. Arden,) said, it was a mere device to prevent alienation; which was attempted in the Duke of Marlborough's case, upon very great advice; and the House of Lords had no difficulty in affirming Lord Northington's decree. He should, therefore, adopt the words of Lord Northington in that case. Declare the trusts of the term of 1000 years, as tending to a perpetuity, and being inconsistent with the rights of the several persons to whom estates in tail are limited by the said deed, to be void, and of no effect. (*a*) †

6. Although public policy has been thus long averse from perpetuities, yet the general propensity of individuals to preserve their acquisitions in their own families, as long as the law would admit, induced them to adopt various modes of assuring their estates to their posterity, by preventing their descendants from alienating them; which produced what, in modern language, are called "*settlements.*" The first of these was effected by the creation of a conditional fee, which had two effects. I. Of suspending the power of alienation till the birth of issue. II. Of preserving the inheritance in a particular line. When conditional fees were converted into estates tail, by the Statute *De Donis*, a simple entail of the land was sufficient to preserve it in the family of the settlor. But upon the introduction of fines and recoveries, settlements of this kind were found to be ineffectual, being barrable by the first tenant in tail. (*b*)

7. When women, seised of estates tail of the gift of their husbands, were prohibited by the statute 11 Hen. VII. ch. 20, ‡ from alienating them; and husbands, seised in right of their wives, were prohibited by the statute 32 Hen. VIII. c. 28, from alien-

(*a*) King *v.* Burchell, tit. 28, c. 9.
(*b*) Tit. 2, c. 1, s. 1. 1 Inst. 290 b, n. 1, s. 3.

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† It has been stated that a condition of non-alienation may be inserted in a lease for life or for years. Tit. 13, c. 1, s. 34. *Note to former edition.*

‡ [This statute (except as to lands in settlements made before the 28th August, 1833,) is repealed by the recent statute for abolishing fines and recoveries, and for the substitution of more simple modes of assurance. 3 & 4 Will. 4, c. 74, s. 17.]

ating them; it became usual to limit the husband's estate to the husband and wife, and the heirs of the body of the wife by the husband; and to limit the wife's estate to the husband and wife, and the heirs of the husband by the wife; by which means the estate was secured to the parents, during their lives, and to *the issue, against the act of either parent; for nothing *333 but the concurrent act of both parents could deprive the issue of the estate; while there was a provision for unforeseen events, by their coöperation during their joint lives. During the life of the surviving parent, the same effects might be produced by the coöperation of that parent, and the issue. And after the decease of both the parents, the estate was restored to the issue, with a complete power of alienation. (*a*)

8. The last mode of settlements was by limiting estates for life to all the persons then in being, with remainders to their children by purchase. This was, however, subject to one inconvenience; for the tenants for life might bar the remainders to their children by the destruction of their estates; but the invention of trustees to preserve contingent remainders, of which an account has been already given, proved an effectual remedy to this abuse. From that time the *usual mode of settlements* upon marriage has been by a limitation of the estate to the parents for life, with remainders to trustees to preserve contingent remainders, remainder to the first and other sons of the marriage, severally in tail, remainder over;[1] by this means the estate is rendered unalienable till the eldest son of the marriage attains the age of twenty-one, when he can join with his father in suffering a common recovery, by which the estate tail limited to the eldest son, and all the subsequent remainders, are barred, and a new estate in fee simple is acquired. (*b*)

9. Another mode of protracting the power of alienation was invented long after, by limiting the estate to the intended husband for ninety-nine years, if he should so long live, and vesting

(*a*) Tit. 36, c. 10. Highway *v.* Banner, *ante*, c. 28, § 40.
(*b*) Tit. 16, c. 6. Idem, c. 7.

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[1] The student will observe that this is the method termed a *strict settlement;* of which a precedent is given in 2 Bl. Comm. App. No. 2; verbose indeed, to an excess; the abridgment of which, by ejecting the superfluous parts, will be found a very profitable exercise in conveyancing.

the freehold in trustees during his life, upon which there was a limitation to the first and other sons of the marriage severally in tail; by which means the power of barring the entail was in general protracted till the death of the father. But this kind of settlement is now generally disused. (*a*)

10. Although *estates for life* are not capable of being entailed, yet they may be so settled as to answer the purposes of an entail; and be rendered unalienable almost for as long a time as estates of inheritance. Thus an estate for life, or lives, may be limited to a person for life, with remainder to his first and other sons severally in tail; and such a settlement can only be barred when the eldest son attains the age of twenty-one. (*b*)

334* *11. *Terms for years* are also incapable of being entailed, because [they are not within the Statute *De Donis*, and for reasons stated in a former volume.] But still terms for years may be settled by deed of trust, as effectually as estates of inheritance. Thus, a declaration of the trust of a term for A for so many years of the term as he shall live, and from his decease upon trust for his first and other sons severally, and the heirs of their bodies, is good; and A will only take an estate for his life. But in such case, the first son who is born takes the absolute interest in the term; if such first son should die immediately after his birth, his interest in the term will vest in his father, if alive, as his next of kin; and if there are several successive tenants for life, with remainder to their several sons, and the heirs of their bodies; if any of the tenants for life have a son, the whole reversionary interest will vest in such son, subject to the preceding estates for life, and the contingency of the preceding tenants for life having sons; and will, on the death of such son, go to his father, though one of the tenants for life, as his next of kin, upon the father's taking out letters of administration to his son; in prejudice of all persons claiming under the subsequent limitations. (*c*)

12. John, Duke of Newcastle, being possessed of divers lands and tenements, held by lease from the Crown for ninety-nine years, devised all his estates, as well leasehold as freehold, to Thomas, Lord Pelham, for life, remainder to his first and other sons in tail male, remainder to Henry Pelham for life, remainder

(*a*) Tit. 16, c. 7. (*b*) Tit. 3, c. 1. (*c*) Tit. 8, c. 2.

to his first and other sons in tail male, remainder to William Vane for life, remainder to his first and other sons in tail male, remainder over. Thomas, Lord Pelham, who afterwards became Duke of Newcastle, never had a son; but Henry Pelham had two sons, both of whom died in his lifetime, viz., Thomas and Henry; Thomas, the eldest, being the person in whom the first estate tail, in the order of limitation, was vested, by virtue of the will. Henry Pelham soon afterwards died, having made his will, and appointed Richard Arundel and H. Perkins his executors; and letters of administration of the personal estate of Thomas Pelham, the infant, were also granted to the said R. Arundel. William Vane had issue two sons, Christopher, the eldest, who died an infant without issue, and William, his second son. This William, who became Lord Vane, took out letters of administration to his brother Christopher, and thereby became entitled *to all such interest in the leasehold premises as *335 vested in his brother Christopher, who was the first person *in esse*, in point of time, who took any estate of inheritance in the freehold premises. Arundel and Perkins filed their bill against Lord Vane and others, stating the above facts, and that they, as executors of the said Henry Pelham, and as administrators of the personal estate of Thomas Pelham, the infant son of Henry Pelham, were become entitled to the absolute interest in the leasehold terms, subject to the life-estate of Thomas, Duke of Newcastle, and the contingency of his having a son born alive; and being so entitled, they had entered into an agreement with George Gregory for the sale of those terms, and prayed that the agreement might be performed specifically, and carried into execution. (*a*)

Lord Vane put in his answer, insisting that his brother Christopher was the first person, in point of time, *in esse*, who took an estate of inheritance in the premises; and that he dying an infant and without issue, Lord Vane, as the only son and surviving heir of his father, William Vane, became the first person *in esse* who took an estate of inheritance in any of the premises, by virtue of the limitations in the will; and denied that the absolute estate and interest in the leaseholds ever vested in Thomas Pelham.

(*a*) Pelham *v.* Gregory, 3 Bro. Parl. Ca. 204.

The cause was heard before Lord Keeper Henley, who dismissed the bill.

On an appeal to the House of Lords, the following questions were put to the Judges:—I. Whether the property of the leasehold estates for years, devised by the will of the Duke of Newcastle, vested in Thomas Pelham, the infant son of Henry Pelham deceased, subject to the Duke of Newcastle's interest therein for his life, and to the contingency of the duke's having a son? II. Whether the property of the said leasehold estates, subject as aforesaid, was transmitted to the representative of the said Thomas Pelham the infant?

The Lord Chief Baron of the Exchequer, and Mr. Justice Denison being present, the Lord Chief Baron delivered their concurrent opinion upon the said two questions in the affirmative. Whereupon it was ordered, that the decree should be reversed; and that the leasehold estates for years, devised by the will of the late Duke of Newcastle, subject to the then present duke's interest therein for his life, and defeasible by the said 336 * * duke's having a son, belonged to the appellants, as standing in the place of the said Thomas Pelham, the infant son of Henry Pelham deceased; and that the agreement entered into between them and George Gregory, for the sale of them, ought to be carried into execution. (*a*)

13. To remedy this inconvenience, it has been the practice of conveyancers, since the time of Sir Orlando Bridgeman, to insert a clause in the deed, declaring that if the first son shall die without issue, under the age of twenty-one years, the term for years shall vest in the second son; subject to the same proviso in favor of all the other sons. And the validity of this mode of limitation was established by Lord Keeper North, in conformity with the opinion of the Judges of the Court of C. P., as being within the period allowed for the vesting of an executory estate, in the case of Massenburg *v.* Ash, and several other cases, which will be stated in a subsequent title. (*b*)

14. In the case of Stanley *v.* Leigh, Sir J. Jekyll said, he had informed himself of the common course of settling terms for years, and found it usual in marriage settlements, to limit them thus: To trustees for the whole term, in trust to permit the

(*a*) *Vide* Foley *v.* Burnell, 4 Bro. Parl. Ca. 319. (*b*) Tit. 38, c. 19.

husband and wife, and the survivor, to receive the rents and profits during so long of the term as they should live; and after the death of the survivor, to permit the first son of the marriage to receive the rents and profits till he attained twenty-one; and if he attained that age, then the trustees to assign the residue of the term to him; but if such first son died under twenty-one, then in trust for the second and other sons, in like manner. (*a*)

15. In a settlement by which freehold estates were limited to the husband for life, with remainder to his first and other sons in tail, a covenant was inserted to assign terms for years to trustees, for such persons, estates, intents, and purposes, as were mentioned concerning the freeholds, or as far as the law would in that case allow or permit. And the Court of Chancery directed such terms for years to be limited in the manner above mentioned.

16. Upon the marriage of Henry, Earl of Lincoln, in 1772, he joined his father, Henry, Duke of Newcastle, in settling several freehold manors, &c., to the use of the duke for life, remainder to Lord Lincoln for life, remainder to his first and other sons in tail male, remainder to his next brother, Lord Thomas Clinton * for life, remainder to his first and other sons in * 337 tail male, remainder to Lord John Clinton in the same manner. And the duke covenanted that he would assign to the trustees of the settlement the manor of Newark, which he held by a lease for years from the Crown; to hold the same in trust for, and for the benefit of such person and persons, and for such or the like estate or estates, and for such and the like ends, intents, and purposes, as were therein before mentioned of and concerning the said manors, &c., thereby granted and released, *as far as the law would in that case allow or permit.* (*b*)

Henry, Earl of Lincoln, died in the lifetime of his father, leaving a son and a daughter; and the son died an infant in the lifetime of the Duke of Newcastle, who never executed any assignment of the leaseholds, pursuant to the covenant.

On the death of Henry, Duke of Newcastle, Lord Thomas Clinton succeeded him, and died in 1795, leaving Henry his eldest son, and Thomas his second son, infants, who filed their

(*a*) 2 P. Wms. 689. Gower *v.* Grosvenor, Barnard, R. 54.
(*b*) Newcastle *v.* Lincoln, 3 Ves. 387.

bill against Lady Lincoln, the widow of Henry, Earl of Lincoln, who had taken out administration to her infant son; stating, that Lady Lincoln had been permitted to take possession of the said manor of Newark; and praying that the settlement made on the marriage of Lord Lincoln, as far as respected the performance of the covenant to convey the leasehold premises, might be established, and carried into execution; and that it might be referred to one of the Masters to settle a proper conveyance of the same; and that such a clause might be inserted therein, as should prevent the absolute vesting of the said leasehold property, until the persons successively entitled to the possession of the same should have attained the age of twenty-one years. To this bill Lady Lincoln put in her answer, and thereby insisted, that the infant son of Lord Lincoln, having survived his father, became entitled to the said leasehold premises, for his own use and benefit; and that in consequence of his death, and by virtue of the Statute of Distributions, Lady Lincoln and her daughter became entitled to the said leaseholds.

The case having been fully argued, Lord Loughborough said, the question arose upon the leasehold property at Newark, which, by the articles, made upon the marriage, was to be settled in the same manner as the freehold estates, as far as the rules of law would admit. He meant to be extremely short in stating
338 * his *opinion, which was decidedly that in cases of marriage articles, where leasehold property was to be subject to a settlement of freehold estates, and the limitations of the freehold went to all the sons in succession, the settlement to be made of the leasehold was to be analogous to that of the freehold; so that no child born, and not attaining the age of twenty-one, should, by his birth, acquire a vested interest, to transmit it to his representatives, and thereby defeat the ulterior objects of the articles; which were not decidedly in favor of one son, but equally extended to every son; and that, he took, from all the course of the cases, to be the settled rule and established practice. He therefore directed a clause to be inserted in the settlement, that no person should be entitled to the absolute property unless he should attain to the age of twenty-one years, or die under that age, leaving issue male.

On an appeal to the House of Lords, this decree was affirmed,

after a long discussion, of which Mr. Vesey has given a full account.†

17. In consequence of the general admission of these modes of settling estates, it became fully established that real property might be rendered unalienable during the existence of a life in being and twenty one years after; that is, till the son of a tenant for life attained his full age. From one life, the Courts gradually proceeded to several lives, in being at the same time; for this in fact only amounted to the life of the survivor; and as it might happen that a tenant for life, to whose unborn son an estate tail was limited, might die leaving his wife *ensient*, an allowance has also been made for the time of gestation of a posthumous son.

18. It may now, therefore, be laid down as a *general rule* of law, that *an estate may be rendered unalienable during the existence of a life, or of any number of lives in being, and nine months and twenty-one years after;* but that *all restraints* on alienation which *exceed* that period are *void;*. and in the case of *deeds*, all the *limitations* are also *void.* (*a*) [1]

19. It should, however, be observed, that the term of twenty-one years was probably adopted, because that is the period
* which must elapse, before an infant can bar an entail. * 339
For Lord Alvanley, in the case of Thellusson *v.* Woodford, has said, that the period of twenty-one years had never been considered as a term that might at all events be added to an executory devise or trust. He had only found this *dictum*, that estates might be unalienable for lives in being, and twenty-one years, merely because a life may be an infant, or *in ventre matris;* therefore he was clearly of opinion, that expression could not be held to mean more than the children in the womb at the testator's death. (*b*)

20. [The point adverted to by Lord Alvanley in the preceding section, arose in the recent case of Beard *v.* Westcott. In that case, the devise was of freehold and leasehold estates to John

(*a*) (See *post*, § 23.)
(*b*) 4 Ves. 337. (*Post*, tit. 38, ch. 20, § 58.)

[† 12 Ves. 217. See, also, Carr *v.* Lord Erroll, 14 Ves. 478, and Lord Deerhurst *v.* D. of St. Albans, 5 Mad. 232; 4 Russ. 316.

[1] [See Proprietors of the Church in Brattle Square *v.* Grant, 3 Gray, 152.]

James Beard, for ninety-nine years, if he should so long live, with remainder to the first son of his body for ninety-nine years, if he should so long live, and so on in tail male to such first son lawfully issuing forever; and for want and in default of such issue of such first son, remainder to the second, and other sons successively, for ninety-nine years only, in case he should so long live; and that such elder son, or the issue of such elder son, should have no greater estate than for ninety-nine years, determinable at his decease. And if there should be no issue male of John James Beard at the time of his death, or in case there should be such issue male at that time, and they should all die before twenty-one without issue male, then there were similar limitations over to Joseph Beard, the brother of John James Beard, and his sons and issue male, with a similar gift over, in default of issue male of Joseph Beard, to the sisters of John James Beard and Joseph Beard. At the time of the testator's death, John James Beard had attained twenty-one, but his brother and sisters were under age; all the devisees were then also unmarried. A case was sent by Sir William Grant, M. R., for the opinion of the Court of Common Pleas on the effect of the above devise. The questions were, first, what estate John James Beard took; and secondly, whether any, and which of the limitations were good. The Court certified, that John James Beard took an estate for ninety-nine years, determinable with his life; and that, upon his death, his first son took a like estate, and that the limitation to Joseph Beard and his first son, in case of John James dying without leaving any sons, or issue male of such sons, living at his death, or being such, they should 340 * die * before twenty-one, without lawful issue male, *was good;* but that the other devises, to the issue male of the unborn sons, were void. (*a*)

The Master of the Rolls, in consequence of what Lord Alvanley, M. R., had said in Thellusson *v.* Woodford, (*b*) above noticed, entertained doubts whether the Court of Common Pleas had not gone too far, holding all the limitations good that could take place during a life or lives in being, or within twenty-one years afterwards, and therefore ordered, that the Court should be again attended with the case, with the following additional question:

(*a*) 5 Taunt. 393. 6 T. R. 213. (*b*) 4 Ves. 387.

"How far the limitations over, in the event of their being no son or sons of John James Beard, nor issue male of such son or sons living at the death of the said John James Beard, or there being such issue male at that time, they should all die before they attained their respective ages of twenty-one years, without lawful issue male, were affected by the circumstance, that they were to take effect at the end of an absolute term of twenty-one years after a life in being, at the death of the testator, without reference to the infancy of the person intended to take; or by the circumstance, that there might be issue of John James Beard living at his death, to whom the estate was given by the will, but who would be incapable of taking according to the above certificate, for whose death, under twenty-one, the limitation over in the event before mentioned must await. In answer to this second question, the Court certified that the limitations over (following the language of the inquiry) were not affected by the circumstance mentioned.

21. In a subsequent stage of the same cause, before Lord Eldon, C., he sent a case to the Court of K. B., embodying the substance of the two questions put to the Judges of the C. P. In answer to which the Judges of the Court of K. B. certified, that John James Beard and his first son took estates for ninety-nine years, determinable with their lives, but that *all the limitations subsequent to and expectant upon the limitation to the first son were void.* (*a*)

22. The cause afterwards came on before Lord Eldon, C., who observed that, under the circumstances of the case, he thought the best thing he could do, was to confirm the certificate of the Court of K. B., and thus help the case to the House of Lords, *if the parties thought it right to take it there. *341 The inclination of his opinion was, that the Court of K. B. was right. (*b*)

23. The point called for decision, in the subsequent case of Bengough *v.* Edridge. In that case the testator devised real estates (subject to the payment of annuities to his wife, and to his nephews, George and Henry Bengough) unto and to the use of trustees and their heirs, upon trust, during the term of twenty-one years, to be computed from the day of his death, to receive

(*a*) 5 B. & Ald. 801. (*b*) 1 Turn. 25.

the rents, and from time to time to invest the same in the purchase of freehold estates, to be conveyed to the trustees for the time being, upon the trusts of the will; and the testator directed that the trustees should stand possessed of his said trust estates during the term of one hundred and twenty years, to commence from his death, if his nephews, George Bengough and Henry Bengough, and several other persons therein named, in number amounting to twenty-eight, or any or either of them should so long live; and also during the term of twenty years, to be computed from the expiration or other sooner determination of the term of one hundred and twenty years; nevertheless, in trust for the persons thereinafter mentioned, that is, upon trust for his nephew, George Bengough, for ninety-nine years, if he should so long live, and the terms of one hundred and twenty, and twenty years, or either of them, should so long continue; and after the determination of the term of ninety-nine years, in trust for the first, second, third, and all and every other subsequent born sons of the said George Bengough successively, according to their births; and after the determination of the estate and interest of each of the same sons respectively, and also, as the circumstances of the case should require, after the determination of the estate of any person taking from time to time under or as answering the description of heir male of his body, in trust for the person who for the time being, and from time to time should answer the description of heir male of his body; or who, in case of the death of his parent, if such death had taken place, would be heir male of his body, under an estate tail limited to the same son, and the heirs male of his body; to hold to the same son or person respectively, for the term of ninety-nine years, if the same son or person should so long live, and the said terms of one hundred and twenty years, and twenty years, or either of them, should so long continue; every elder of such sons or per-
342* sons, &c., to be *preferred before the younger, &c. And after the determination of the estates and interests of the first and every other subsequent born sons of the same George Bengough, and of the person who for the time being should or would be heir male of the body of the same sons respectively; then in trust for his nephew, Henry Bengough, and his issue male, as before, with similar limitations to the other persons

named. And the testator directed that after the determination of the terms of one hundred and twenty years, and twenty years, his trust estates should be settled, conveyed, and assured by the trustee or trustees thereof, to and upon such person or persons as would at that time be entitled to the same, either by purchase or descent for the first and immediate estate or estates for life, in tail or in fee therein, if the same estates had been devised to the use of his nephew, George Bengough, for life, with remainder to his first and other sons successively in tail male, with similar remainders in succession, to his nephew, Henry Bengough, and to the other persons therein named, in favor of whom the trusts had been before declared, with remainder to his own right heirs. The testator directed the residue of his personal estate to be invested in the purchase of real estate, to be settled to the same uses as the estates devised by his will.

The question was, whether the trusts were not void for remoteness. The case was elaborately and ably argued. The question being, as admitted by Mr. Preston in support of the will, whether the vesting of the estates could be suspended for lives in being, and twenty-one years, not with reference to minority, but of positive time. * Sir John Leach, V. C., decided in fa- *343 vor of the limitations in the will, observing, that although the rule of law be framed by analogy to the case of a strict settlement, where the twenty-one years was allowed in respect of the infancy of the tenant in tail, yet he considered it to be * fully settled, that limitations, by way of devise or *344 springing use, might be made to depend upon an absolute term of twenty-one years after lives in being. (*a*)

Against this decree there was an appeal (*b*) to the House of Lords, under the name of Cadell *v.* Palmer; upon which the following questions were submitted for the opinion of the Judges.

First. Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards, as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person.

(*a*) 1 Sim. 267. (*b*) 10 Bing. 140.

Secondly. Whether a limitation by way of executory devise is void, as too remote or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, *together with the number of months equal to the ordinary period of gestation*, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever born, or *en ventre sa mère.*

Thirdly. Whether a limitation by way of executory devise is void as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, *together with the number of months equal to the longest period of gestation*, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever born, or *en ventre sa mère.*

The unanimous opinion of the Judges was delivered by Mr. Justice Bayley, that the limitation mentioned in the first question was valid; and with reference to the second and third questions, whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of
345 * any person *whatever, born or *en ventre sa mère*,—that the unanimous opinion of the Judges was, that such a limitation would be void, as too remote. They considered *twenty-one years as the limit*, and the *period of gestation* to be allowed *in those cases only in which gestation exists.*]

24. We have seen that, in conveyances deriving their effect from the Statute of Uses, *springing and shifting uses* might be created to arise upon, or after a limitation in fee simple. And it having been determined, that neither a fine nor a recovery, nor any other act of the first taker, should defeat such springing or shifting use, it became therefore necessary to ascertain the time when such use should become vested; for otherwise uses of this kind might be limited on such remote contingencies, as to create

perpetuities. It was therefore established, that if an estate in fee simple was first limited, *the event on which it was to change* must be such, that it *must either take place or become incapable of taking place, during the existence of one or more life or lives then in being and nine months and twenty-one years after;* otherwise it will be void, as tending to a perpetuity.

25. Thus, where husband and wife levied a fine of the wife's estate, to the use of the heirs of the body of the husband on the wife begotten, remainder to the use of the right heirs of the husband; the limitation to the heirs of the body of the husband was held to be void, as a contingent remainder, for want of a preceding estate of freehold to support it. And Mr. Fearne observes, that there was no sort of ground to maintain the validity of the limitation to the right heirs of the husband, as a future use, as it was postponed to a general failure of heirs of the body of the husband by the wife, which was too remote. (*a*)

26. In the case of Lloyd *v.* Carew, Lord Somers dismissed the bill, because the event, on which the use was to shift, being to take place within one year after the death of persons in being, was too remote; and tended to a perpetuity. But the House of Lords reversed the decree, after hearing the Judges, and ordered, that on payment of £4000 to Sir Richard Carew, or into the Court of Chancery, for his issue, the appellants, as heirs of Penelope, should be let into possession of the premises in question. (*b*)

27. * With respect to uses arising from the execution * 346
of powers of revocation and appointment, it has been observed, that an appointment operates under the Statute of Uses, not as a conveyance of the land, but as a substitution of a new use in the place of the former one; and a designation of the person in whom the new use is to vest. For the person, taking under a power, does not derive his estate from the person executing the power, but under the original conveyance by which the power was created, in the same manner as if the use appointed had been limited to him in such conveyance. From which it follows, that the *uses created by an appointment* under a power, *must be such as would have been good if limited in the deed* by which the power was given. (*c*)

(*a*) Davis *v.* Speed, Show. Parl. Ca. 104. Fearne, Cont. Rem. 285, 8th ed. Fearne, Ex. Dev. 390. (*b*) Tit. 16, c. 5, § 31. 1 Com. Rep. 20. (*c*) *Ante*, c. 17, § 93.

28. John, Duke of Marlborough, devised all his estates to trustees and their heirs, to the use of his daughter Harriet, Countess of Godolphin, for life; remainder to Lord Ryalton her eldest son, for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of Lord Ryalton in tail male; remainder to Lord Robert Spencer, eldest son of his second daughter, Anne, Countess of Sunderland, for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male; remainder to Charles Spencer (afterwards Duke of Marlborough) in the same manner; and inserted a clause in his will, empowering his trustees, on the birth of each son of the said Lord Ryalton, Lords Robert and Charles Spencer, to revoke and make void the respective uses limited to their respective sons in tail male; and in lieu thereof, to limit the premises to the use of such sons, for their lives, with immediate remainders to the respective sons of such sons, severally and respectively in tail male. And he gave his household furniture, plate, &c., in the same manner.

Upon an application to the Court of Chancery by the trustees, for further directions in carrying the trusts of the will into execution, a question having arisen touching the power given, in the will, to revoke the uses limited to the first and other sons in tail, and to limit the premises to the use of such sons for life only; Lord Northington declared, that the clause of revocation and settlement in the will, as tending to a perpetuity, and repugnant to the estate limited, was void and of no effect. (*a*)

347 * * On an appeal from this decree to the House of Lords, after hearing counsel on this appeal, the Judges were ordered to deliver their opinions to the House upon the following question, viz.: "Whether, by the rules of law, an estate tail, limited to the use of persons unborn, by any deed or will, can, by virtue of any power given by such deed or will to trustees, be revoked upon the births of such persons, and a new estate limited to such persons for their lives respectively, with remainders to the issue of such persons successively in tail male?" And the Lord Chief Justice of the Common Pleas having delivered the unanimous opinion of the Judges in the negative, the decree was affirmed. (*b*)

(*a*) Spencer *v.* Duke of Marlborough, 3 Bro. Parl. Ca. 232. 1 Eden, 404.
(*b*) Heath *v.* Heath, 2 Eden, 330.

29. The *rules respecting perpetuities* are as *applicable to declarations of trust of terms for years*, as to any other conveyances. But the cases on this subject being governed by the same principles as those by which executory devises of terms for years are regulated, they will be stated under that head. (*a*)

30. These *rules do not*, however, *apply to contingent uses upon or after an estate tail* [and which are limited to take effect, not at any indefinite period of time, but so as to take effect (if at all) during the compass of the estate tail, or *eo instanti* that it determines; because in that case, a common recovery suffered by the tenant in tail, before the happening of the event on which the limitation is to arise, will destroy such limitation. But where the event on which the executory devise over, is limited, is collateral to and independent of the previous estate tail, the executory devise over would be void, if beyond the prescribed limit.] (*b*)

31. Thus, although a shifting clause, annexed to the limitation of a use in fee, must take effect within the period above mentioned; yet where an estate is limited to a person for life, with remainder to his first and other sons in tail; with a proviso, that if a certain estate shall devolve on the tenant for life, or any of his sons, the estate limited to him, and also those limited to his sons, shall cease, as if he and they were dead without issue, and the estate shall go over to another person; this clause is good, because when the first or other son attains twenty-one years, and comes into possession, he may bar his estate tail, and also the effect of this clause, by a common recovery; so that there is no danger of a perpetuity. (*c*)

*32. It was formerly much doubted, whether a *limitation for life to an unborn person*, was good. But it is now fully settled that such a limitation is valid.[1] *350

In a modern case, Lord Kenyon said—"I remember hearing Lord Mansfield say, that when the case of Spencer *v.* Duke of

(*a*) Tit. 38, c. 19.

(*b*) Gulliver *v.* Shuckburgh Ashby, 4 Bur. 1929. Tit. 36, c. 8. Lanesborough *v.* Fox, Ca. Tem. Talb. 262.

(*c*) Tit. 16, c. 5, 1 Inst. 327 a, n. 1. Doe *v.* Heneage, tit. 16, c. 5, § 34.

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[1] See *ante*, tit. 16, ch. 4, § 13, note. See also Harper *v.* Archer, 4 Sm. & Marsh. 99. The general rule is—*Posthumus pro nato habetur*. 24 Am. Jur. 3, Just. Inst. lib. 2, tit. 13, l. 1, 2. Cod. lib. 6, tit. 29.

Marlborough was to be argued in the House of Lords, there was found to be a mistake in the printed reasons, on the part of those who opposed the execution of the power, in the manner intended. For it had been stated, that there could not be a limitation to an unborn child for life; but that was found to be wrong; (†) for certainly there may be such a limitation; they therefore cancelled that reason, and framed another, stating the proposition to be, that there could not be a limitation to an unborn child for life, with limitations to the issue of such unborn child, in succession; and that doctrine was distinctly laid down by the learned Judge who delivered the opinion of the Judges in the House of Lords." (*a*)

33. An estate may also be limited, by an appointment to a person for life, who is not born at the time when the deed, by which the power was created, was executed. (*b*)

34. It is now settled, that *a vested remainder may be limited upon an estate for life given to an unborn person;* and Lord Alvanley has said,—" A question might arise how far an unborn child is to be made tenant for life; but it is established on good principle, in precedent certainly, that this may be. The doubt was, whether this was not tying up the estate beyond lives in being and twenty-one years afterwards; but that is not so, where the absolute interest is disposed of, and vested, though part is given for life; for that person, with the person having the absolute interest, may dispose of it. It is not unalienable." (*c*)

35. But it is equally clear, from what has been stated in the preceding sections, that *no estate can be limited to the issue of an unborn person, as a purchaser*, that being a possibility upon a possibility, which the law will in no case admit; and would also render an estate so limited unalienable for a longer period than is allowed. But a limitation of this kind would not render the limitation to the *unborn person for life* void. (*d*)

(*a*) 1 East, 452. *Supra*, ss. 20, 23. Hay *v.* Coventry, 3 Term Rep. 83, S. P.
(*b*) Brudenell *v.* Elwes, *ante*, c. 17, § 52.
(*c*) Routledge *v.* Dorrill, 2 Ves. 357.
(*d*) Fearne, Ex. Dev. 502, 8th ed. Beard *v.* Wescott, 5 Barn. & Ald. 801. *Supra*, s. 20.

[† Mr. Booth was the person who pointed out that circumstance to Mr. Filmer. Cases and Opinions, Vol. II. 434.—*Note to former edition.*]

36. *Estates may be rendered unalienable by act of parliament,* *as in the case of estates tail, granted by the *351 crown to individuals, as a reward for services, where the remainder or reversion is vested in the crown; which cannot be barred by fine or recovery. (*a*)

37. There are also several instances of particular estates, which are rendered unalienable by act of parliament. Thus, by a special act of parliament made in 27 Hen. VIII., the manor of Hemston Arundel was entailed to Anne wife of Charles Lord Mountjoy, and John Pawlett and Elizabeth his wife, and to the heirs of their bodies begotten; with a proviso, that they should not bar the entail; which was held good by the Court of King's Bench. (*b*)

38. By a private act, 3 Charles I., the castle, honor, manor, and lordship of Arundel, together with other estates, were limited to Thomas, Earl of Arundel and Surry, and the heirs male of his body; remainder to the heirs of the body of the said earl; remainder to Lord William Howard, and the heirs male of his body; remainder to the heirs of the body of the said Lord William Howard; remainder to the said Earl of Arundel and his heirs. And it was enacted, that neither the said Thomas, Earl of Arundel, nor any of the heirs male or other heirs of his body, nor any other person or persons, his or their heirs male of his or their bodies issuing, to whom any estate of inheritance of or in the premises, or any part thereof, should thereafter come, descend, or accrue, by force or means of the said act, should thereafter aliene, give, grant, bargain, and sell, or otherwise convey away the same, or any part thereof, or any other thing do, which should or might be to the disherison of the heirs inheritable, by force of the said act, or whereby any of them should be barred, or put from entry into the premises.

39. By the stat. 5 & 6 Anne, c. 3, it is enacted, that the Duke of Marlborough shall stand and be seised of the honor, manor, and park of Woodstock, for and during the term of his natural life, remainder to the heirs male of his body, remainder to all his daughters, and the heirs male of their respective bodies, severally and successively, according to the priority of their birth; with a proviso, that neither the duke or the heirs male of his body, nor

(*a*) *Vide* tit. 36, c. 10.

(*b*) Mountjoy's case, 5 Rep 8.

any of his daughters or the heirs male of their bodies, shall have any power, by fine or recovery, or any other act, to hinder, bar, or disinherit any the person or persons to or upon whom the said manors, &c., were thereby limited, from holding, or enjoying the same, according to the limitations in the act mentioned.

CHAP. XXV.

CONSTRUCTION—REDDENDUM, CONDITION, AND WARRANTY.

SECT. 1. *Reddendum.*
2. *Condition.*
11. *Warranty.*
12. *Express Warranty.*
15. *Implied Warranty.*
22. *Lineal Warranty.*
SECT. 25. *Only binds the Heir where he has Assets.*
27. *Collateral Warranty.*
29. *Statute 4 Ann. c. 16.*
31. *How Warranties may be destroyed.*

SECTION 1. With respect to the *reddendum* or reservation in a deed, the following circumstances are necessary to make it good. I. It must be by *apt words.* II. It must be of *some other thing*, issuing or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing. III. It must be of such thing *whereunto the grantor may resort to distrain.* IV. It must be *made to one of the grantors*, and not to a stranger to the deed. (*a*)

2. The nature of conditions having been explained in title 13, it will here only be necessary to inquire *by what words a condition in a deed may be created.*

Littleton says:—"Divers words there be, which by virtue of themselves make estates upon condition. One is the word, *sub conditione.* As if A enfeoff B of certain lands, to have and to hold to the said B and his heirs, '*upon condition*' that the said B and his heirs do pay, or cause to be paid, to the aforesaid A and his heirs, yearly, such a rent, &c.; in this case, without any more saying, the feoffee hath an estate upon condition. Also, if the words were such, '*provided always*,' that the aforesaid B do pay, or cause to be paid, to the aforesaid A such a rent, &c.; or these, '*so that*' the said B do pay, or cause to *353 be paid to the aforesaid A such a rent, &c.; in these cases, without more saying, the feoffee hath but an estate on condition. Also, there be other words in a deed, which cause the

(*a*) 1 Inst. 47 a, Shep. Touch. 80. Tit. 28, c. 1.

tenements to be conditional. As if upon such feoffment a rent be reserved to the feoffor, &c., and afterwards this word is put into the deed; that "*if it happen*" the aforesaid rent to be behind in part or in all, that then it shall be lawful for the feoffor and his heirs to enter, &c.: this is a deed upon a condition." (*a*)

3. There are *other words* that make a condition in a deed, *provided a power of entry is added to them.* Thus Littleton says, the words *si contingat* will create a condition, if a power of entry is added; and therefore, if A grants lands to B, to have and to hold to him and his heirs; "*and if*," or, "*but if it happen*," that the said B do not pay to A £10 at Easter, without more words, this is not a good condition. But if these words be added, that "*then it shall be lawful for A to reënter*," it will be a good condition. (*b*) [1]

4. It is said in the Touchstone, that although the words "*proviso*," "*ita quod*," and "*sub conditione*," are the most proper words to make a condition, yet they had not always that effect, but frequently served for other purposes; for sometimes they operated as a *qualification* or *limitation*, and sometimes as a *covenant.* And *when inserted among the covenants* in a deed, they operated as *a condition* only when attended with the following circumstances: I. Where the clause wherein they were, had *no dependence upon any other sentence* in the deed, but stood by itself. II. Where it was *compulsory to the feoffee, donee, &c.* III. Where it came on the part, and *by the words of the feoffor, donor*, or *lessor*, &c. IV. Where it was *applied to the estate*, and (not) to some other matter. (*c*)

5. Thus, if a person grants a manor, with an advowson appendant, and after the *habendum* and reservation of the rent, amongst the covenants, there is this clause inserted: "provided that the grantee shall regrant the advowson for the life of the grantor;" this is a good condition. (*d*)

6. The word "*provided*" may operate as a condition and a covenant; as if the words are, "*provided always, and the feoffee*

(*a*) Lit. s. 329, 330.
(*b*) Lit. s. 331. Shep. Touch. 122.
(*c*) Idem.
(*d*) Idem.

[1] Cited and approved by Best, C. J., in Doe *v.* Phillips, 2 Bing. 13.

doth covenant," that neither he nor his heirs shall do such an act; this is *both a condition and a covenant.* But if the clause have dependence on another clause of the deed; or be the words of the *feoffee to compel the feoffor to do *354 something; then it is not a condition, but a covenant only: as if there be in a deed a covenant that the lessee shall scour the ditches, and then these words follow; "*provided that the lessor shall carry away the earth:*" or if there is a covenant that the lessee shall repair the houses, and then these words follow; "*provided that the lessor do provide timber:*" there it is only *a covenant.* (*a*)

7. So if this clause be *applied to some other thing*, and not to the thing granted, then *it is no condition.* As if a lease of land be made, rendering rent at B; provided that if such a thing happen, it shall be paid at C: this does not make the estate conditional. Or, a lease is made for years, without impeachment of waste; provided that the lessee shall not pull down the houses; this does not make the estate conditional. Or, a lease is made for years, rendering rent; provided that the lessor shall not distrain for the rent; this is a good condition, but not annexed to the estate. (*b*)

8. Lord Coke says, the word *si*, if, frequently creates a condition, but not always; for sometimes it makes a limitation; as where a lease is made for years, if J. S. shall so long live. (*c*)

9. Conditions may be annexed to *demises for years, without any of these formal words*, where the *apparent intent* of the lessor is to make the estate conditional; although the words be not used as the words of the lessor, but as those of the lessee, or indefinitely of neither. Thus, if a lessee for years covenanted in his lease, that if he, his executors, or assigns, shall aliene, it shall be lawful for the lessor to reënter; it seems this is a good condition, and not a covenant only; and the lessor may take it as a covenant or condition; but not as both. (*d*)

10. It was laid down in a modern case, by the Court of King's Bench, that *no precise technical words are required in a deed, to make a stipulation a condition precedent or subsequent;* neither

(*a*) Shep. Touch. 122. 1 Inst. 203 b. (*b*) Idem.
(*c*) 1 Inst. 204 a, 214 b. Shep. Touch. 123.
(*d*) Idem. 1 Inst. 204 a. Whichcot v. Fox, tit. 13, c. 1, § 40.

did it depend on the circumstance, whether the clause was placed *prior or posterior* in the deed, so that it operated as a proviso or a covenant; for the same words had been construed to operate as either the one or the other, according to the nature of the transaction. (*a*) [1]

11. Lord Coke's description of a warranty having been already stated, I shall proceed to inquire into the *different kinds of warranties*, and their *effects*. (*b*)

355 * *12. *Warranties of lands* † may be either *expressed* or *implied;* either *in deed*, or *in law*.[2] An *express warranty*, or a warranty in deed, is where the grantor of an estate

(*a*) 1 Term R. 645. Willes Rep. 156. [*b*] *Ante*, c. 2, s. 70.

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[1] As to conditions precedent and subsequent, and the rules by which they are to be adjudged such, see *ante*, tit. 13, ch. 1, § 3, note. And see Vanhorne *v.* Dorrance, 2 Dall. 317, per Patterson, J.; Hutcheson *v.* McNutt, 1 Ham. 14; Cunningham *v.* Morrell, 10 Johns. 203; Bennet *v.* Pixley, 7 Johns. 249; Parsons *v.* Miller, 15 Wend. 564; Hayden *v.* Stoughton, 5 Pick. 528; Brigham *v.* Shattuck, 10 Pick. 309; Michigan St. Bank *v.* Hastings, 1 Doug. Mich. R. 225; Id. *v.* Hammond, Ibid. 527; Fultz *v.* House, 6 Sm. & Marsh. 404; Kuykendall *v.* Gilbreath, 3 Pike, 222; Creswell *v.* Lawson, 7 Gill & J. 227.

In agreements for purchase, the covenants of the respective parties are regarded as dependent, the one precedent to the other, unless a contrary intent appears; and neither party can maintain an action against the other, without averring and proving performance on his own part, or showing some valid excuse, equivalent thereto. Shinn *v.* Roberts, 1 Spencer, N. Jer. Rep. 435.

[2] The warranty here mentioned was of feudal origin, and is not known ever to have been adopted or recognized, in practice, in the United States. By it, if the tenant was evicted of the lands, he recovered other lands of equal value, from his lord. But here, the covenant though in the ancient form, and running with the land, has always been regarded as merely personal in respect to the damages. See 4 Kent, Comm. 469–472. This branch of learning, however, though obsolete in practice, is still necessary for the student; so far, at least, as it affects the rule by which the damages ought properly to be assessed in actions upon the modern covenant of warranty; for which, see 2 Greenl. Evid. § 264, tit. *Damages*. The history and principles of the old law are briefly but very clearly stated in 1 Inst. 365 a, note 315, by Mr. Butler.

[† Warranties of lands made or entered into after the 31st day of December, 1833, are, it would seem, abolished by the recent statutes of limitation, and for abolishing fines and recoveries. By the stat. 3 & 4 Will. 4, c. 27, s. 39, it is enacted, that no warranty which may be made after the 31st day of December, 1833, shall toll or defeat any right of entry or action for the recovery of land. And by c. 74, s. 14, it is enacted, that all warranties of lands, which after the above-mentioned day shall be made or entered into by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail.]

enters into an express agreement to warrant it to the grantee; and in this the word *warrantizo*, or "*warrant*," is the only apt and effectual one, which cannot be supplied by any other. (*a*)

13. The word "*heirs*" is absolutely *necessary in an express warranty;* for otherwise the heirs of the warrantor will not be bound. It is the same with respect to the person to whom the warranty is made; for if it be not to the warrantee and his heirs, or in words which imply his heirs, it will cease upon the death of the warrantee. (*b*)

14. To make a good *express warranty*, the following circumstances are necessary: — I. That *the person* who makes the warranty *be capable* of so doing; for if an infant makes a feoffment in fee of land, and binds himself and his heirs to warrant it, the warranty is void, though the feoffment is only voidable. II. A warranty must be made *by deed in writing;* for a warranty inserted in a will would be void. III. There must be some *estate* to which the warranty is annexed, which is *capable of supporting it;* for if a person covenants to warrant land to another, and makes him no estate, or makes him an estate that is not good, and covenants to warrant the thing; in these cases the warranty is void. IV. The estate to which the warranty is annexed must be capable of supporting it, that is, it must be *an estate of freehold;* for if a person makes a lease for years, and binds himself and his heirs to warrant the land to the lessee, this is no warranty; though it may amount to a covenant. V. The warranty must *descend upon the person who is heir of the whole blood*, by the common law, to him who made the warranty. VI. *The* **heir must continue heir;* and neither the descent *356 of the title, nor of the warranty, must be interrupted; for if a person binds himself and his heirs to warranty, and afterwards is attainted of treason or felony, and dies, this warranty will not bind his heirs. So if a tenant in tail be disseised, and after release to the disseisor, with warranty, and the tenant in tail is attainted of felony, and hath issue and dies, this warranty will not bind the issue. VII. The *estate that is to be barred* by a warranty, *must be devested and turned to a right, before or at the time when the warranty is made;* and the person on whom

(*a*) 1 Inst. 384 a.

(*b*) 1 Inst. 383 b.

the warranty descends, must then have but a right to the land. VIII. The warranty must *take effect in the lifetime of the ancestor*, who must be bound by it; for the heir shall never be bound by an express warranty, unless the ancestor was bound by it. IX. The *heir must claim in the same right* that the ancestor did. So the heir must be *of full age*, when the warranty falls upon him; otherwise he will not be barred by it. (*a*)[1]

15. *Implied warranties* arise from some other word than the word "*warranty*," or from the nature of the deed. Thus, it has been already stated, that by the feudal law, if the tenant was *evicted out of his feud*, the lord was obliged to give him another of equal value. In conformity to this principle it appears to have been the established law, when Glanville wrote, that every *feoffment* implied a warranty:[2] *Tenentur autem hæredes donatorum donationes, et res donatas, sicut rationabiliter factæ sunt, illis quibus factæ sunt, et hæredibus suis warrantizare.* And the same law prevailed in Bracton's time. (*b*)

16. This doctrine was confirmed by the Statute *De Bigamis*, 4 Edw. I., which declares, that, "in deeds where is contained *dedi et concessi tale tenementum*, without homage, or without a clause that containeth warranty, and to be holden of the givers and their heirs, by a certain service; it is agreed that the givers, and their heirs, shall be bounden to warranty. And where is contained *dedi et concessi*, &c. to be holden of the chief lords of the fee, or of others, and not of the feoffors, or of their heirs, reserving no service, without homage, or without the aforesaid clause, their heirs shall not be bounden to warranty; notwithstanding the feoffor, during his own life, by force of his own gift, shall be bound to warrant." (*c*)

(*a*) 1 Inst. 367 b. Shep. Touch. 186. 1 Inst. 386 a. Idem, 378 a. 10 Rep. 96. Vide tit. 35, c. 13. 1 Inst. 386 a, 370 a, 380 a. 1 Ld. Raym. 85.

(*b*) Glanv. l. 7, c. 2. Bract. 388 b. (*c*) 2 Inst. 274.

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[1] Unless his entry was not lawful. For if the heir were an infant at the time of the descent of the warranty, *laches* shall not be imputed to him for not entering and defeating the wrongful estate. But if he suffered it to remain until after his arrival at full age, and *then* the warranty descended, the warranty may be pleaded in bar of his action for the land. See 1 Inst. 380 b.

[2] "For," says Lord Coke, "where *dedi* is accompanied with a perdurable tenure of the feoffor and his heirs, there *dedi* importeth a perdurable warranty for the feoffor and his heirs to the feoffee and his heirs; and herewith agreeth Glanville;"—quoting the passage in the text.

17. In this case, it is evident that the warranty was a *consequence of tenure; for where there was no tenure *357 between the feoffor and feoffee, the warranty was confined to the donor, who was considered as bound by his own act, but did [not] extend to his heirs. When it was enacted, by the Statute *Quia Emptores*, that in all future feoffments in fee simple, the feoffee should hold of the chief lord, and not of the feoffor, the implied warranty arising from the word *dedi*, was held only to bind the feoffor during his life, and not his heirs. But where a person granted lands to another in tail, or for life, reserving the reversion to himself, as the grantee held of the grantor, there being a tenure subsisting between them, the old law still continued; and, therefore, where these estates were created by the word *dedi*, the donor and his heirs were bound to warranty. But where a person granted an estate tail, or for life, by the word *dedi*, with a remainder over in fee simple, as no tenure continued between the donor and donee, the warranty only continued during the life of the donor. (*a*)

18. Lord Coke says, if a man makes a lease for life by the word *dedi*, reserving rent, and adds an express warranty, it will not take away the warranty in law; for the lessee will have his election to vouch by force of either of them. (*b*).

19. The doctrine of implied warranties still exists, where estates tail or for life are created by the word *dedi* or give; and the donor does not part with the reversion. But Lord Coke says, *dedi* is the only word that implies a warranty, and not the word *concessi*. It has however been generally supposed, that the word "*grant*," in any conveyance, will create a warranty, and therefore trustees are advised not to convey by the word "*grant*." But it is now agreed, that the word "*grant*," when used in the conveyance of a *freehold estate, does not imply a warranty;* and that if it did, the insertion of any express covenant on the part of the grantor, would qualify and restrain its force and operation within the import and effect of that covenant; for when it appears, by express words, how far the parties designed the warranty should extend, the law will not carry it further by construction. (*c*)

(*a*) *Ante*, c. 1. 1 Inst. 384 a. 2 Inst. 275. (*b*) 1 Inst. 384 a, n. 1.
(*c*) 1 Inst. 384 a, n. 1. *Vide sup.* s. 12, n. Nokes's case, *infra*, c. 26. *Infra*, c. 36.

20. It was resolved in 1 James:—I. That in every *exchange*, the word *excambium*, "*exchange*," implies in itself *tacitè a condition*, and also a *warranty;* the one to give a reëntry, and the other a voucher and recompense; and all in respect of the reciprocal consideration, the one land being given in exchange
358 * for the other. But * it is as *special warranty;* for upon the voucher by force of it, he shall not recover other land in value, but that only which was by him given in exchange. For inasmuch as the mutual consideration is the cause of the warranty, it shall therefore extend only to lands reciprocally given, and not to other lands. And this warranty runs only in privity, for none shall vouch by force of it, but the parties to the exchange or their heirs, and no assignee. II. That if A gives in exchange *three acres* to B, for other three acres, and afterwards *one acre is evicted* from B, in that case *the whole exchange is defeated*, and B may enter into all his land; for although the exchange had been good, if A had given but two acres, or but one acre or less, yet forasmuch as all the three acres were given, in exchange for the others, and the condition which was implied in the exchange was entire; upon the eviction of one acre, the condition in law was broken, and therefore an entry was given on the whole. III. That as, when the whole estate in part was evicted, the exchange was defeated; so when an estate of freehold *for life*, which was but *parcel of the estate*, was *evicted*, the *exchange was defeated.* (*a*)

21. In all deeds of *partition between coparceners*, there is *a warranty annexed to each part;* so that if either be impleaded, she may vouch her sister, and if she loses, she may recover one moiety of her loss in value against the other sister. For there is a condition annexed to every partition, similar to that annexed to every exchange; that if either the whole of any one share, or an estate for life or in tail, be thereout evicted, the party so evicted may enter on her sister's moiety, and avoid the partition of an undivided moiety of what is left. (*b*)

22. Warranty is again divided into *lineal* and *collateral.* *Lineal warranty* is *where the heir derives, or might possibly derive, his title to the land warranted, either from or through the ancestor who made the warranty.* Thus, where a man, seised in fee,

(*a*) Bustard's case, 4 Rep. 121. 1 Inst. 173 b.

(*b*) 1 Inst. 173 b. See tit. 19.

made a feoffment, and bound himself and his heirs to warranty, and died leaving a son, upon whom the warranty descended, it was a lineal warranty. So where a father, or an eldest son in the lifetime of his father, released to a disseisor, with warranty, this was lineal to the younger son. (*a*)

23. The *effects of a lineal warranty* are, I. To *bar the warrantor and his heirs* from ever claiming the lands warranted; so *that if a purchaser with warranty is impleaded by the warrantor or his heirs, he may show his warranty, which in pleading is called a rebutter, and is an effectual bar to the claim. II. To *compel the warrantor and his heirs* to give the warrantee, in case of eviction, *lands of equal value* to those he has lost; and therefore if a purchaser with warranty is impleaded or sued by a stranger for the land, he may vouch, that is, call in the warrantor or his heirs, to defend the land; and if the vouchee cannot defend them, he must then give the warrantee lands of equal value to those he has lost. *359

24. A purchaser with warranty might also at any time bring a writ of *warrantia chartæ* upon the warranty, either against the warrantor or his heirs; and by that means *all the lands whereof the warrantor or his heirs was seised at the time of suing out the writ*, would be bound and charged with the warranty. (*b*) †

25. The *obligation*, which *the heir* of the warrantor is under, in the case of a lineal warranty, of giving to the warrantee, upon eviction, lands of equal value to those he has lost, is however *only on condition that he has other lands of equal value, by descent*, from the warranting ancestor; which are called *assets*.

26. Lands in possession of an heir must have the *following qualities:* I. They must be *assets*, that is of *equal value or more*, at the time of the descent. II. They must be *by descent*, and not by purchase or gift. III. They must be *estates in fee simple*, and not in tail, or for another man's life. IV. They must descend to him *as heir to the same ancestor* that made the war-

(*a*) (4 Kent. Comm. 469.) Lit. 8, 707.
(*b*) Fitz. N. B. 134. 1 Rep. 1. See Vol. III. tit. 31, c. 2, s. 5, note.

[† But that writ, among many others, is abolished by the recent stat. 3 & 4 Will. 4, c. 27, in most cases, after the 31st day of Dec. 1834, (s. 36); but some special exceptions are provided for by sections 37 and 38, which allow a longer period. See Vol. III. tit. 31, c. 2, § 5, and note.]

ranty. V. *Nothing but lands or tenements*, or rents or services valuable, or *other profits issuing out of lands or tenements*, are assets, and not personal inheritances, as annuities and the like. VI. The lands must be *in estate or interest*, and not in use, or right of action, or right of entry; for they are not assets till they are *reduced into possession.* (*a*)

27. A *collateral warranty* is, *where the heir's title to the land neither was, nor could have been derived from the warranting ancestor;* and yet it barred the heir from ever claiming
360* the *land; and also imposed on him the same obligation of giving the warrantee other lands, in case of eviction, as if the warranty were lineal, provided the heir had assets. (*b*)

28. Thus, Littleton says, if there was father and son, and the son purchased lands in fee, and the father disseised the son, and aliened in fee by deed, and bound himself and his heirs to warranty, and died, the son was barred by this warranty, which was collateral, though it descended lineally from the father to the son, because the son did not derive his title to this estate from his father, for the father had no estate in right in the land. (*c*)

365* *29. By the statute 4 Ann. c. 16, s. 21, it is enacted that all warranties made after the first day of Trinity Term, 1706, by any tenant for life, of any lands, tenements, or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void and of none effect. And likewise all collateral warranties which shall be made after the same day, of any lands, tenements, or hereditaments, by any ancestor who has no estate of inheritance in possession in the same, shall be void against his heir. (*d*)

30. It is observable that this act does not extend to alienations by tenants in tail in possession; and therefore their warranties were not restrained by this act, but had the same effect as they had before. (*e*)

366* *31. A *warranty, whether lineal or collateral, may be defeated*, determined, or avoided, *in all* or *in part.* And this is sometimes by matter *in law*, and sometimes by matter *in deed.*

32. Thus, *if the estate* to which the warranty is annexed, *be*

(*a*) 1 Inst. 374 b. (*b*) (Sisson *v.* Seabury, 1 Sumn. 235, 262. 4 Kent, Comm. 469.)
(*c*) Lit. ss. 704, 5. (*d*) Stat. 4 Ann. c. 16. (*e*) *Vide* tit. 35, c. 9.

gone, the *warranty is gone also;* and, therefore, if an estate tail, to which a warranty is annexed, be spent, the warranty is determined. (*a*)

33. Warranties may also be defeated by matter in deed; as, if the person to whom a warranty is made, or *who has the estate* to which the warranty is annexed, *releases* to the person who is bound to warrant, all warranties, or all manner of covenants real, or all manner of demands, the warranty is extinct. (*b*) [1]

(*a*) Shep. Touch. 201. (*b*) Lit. s. 748.

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[1] A release, in order to discharge a covenant running with the land, must in all cases be made by the person owning the land at the time when the release is made. And it is good only against subsequent purchasers with notice. Leighton *v.* Perkins, 2 N. Hamp. 427; Pile *v.* Benham, 3 Hayw. 176; 1 Greenl. Evid. § 428; Abby *v.* Goodrich, 3 Day, 433.

CHAP. XXVI.

CONSTRUCTION — COVENANTS.

SECT. 1. *Nature of.*
5. *No technical Words necessary.*
12. *How construed.*
13. *Implied Covenants.*
17. *Qualified by express ones.*
19. *Joint and several Covenants.*
23. *Covenants real.*
27. *Extend to all claiming under the Grantee.*
35. *Except Under-tenants.*
39. *The Assignor still liable.*
41. *The Grantees of Reversions entitled to the Benefit of Covenants.*
44. *General and specific Covenants.*
46. *Usual Covenants for the Title.*
47. *That the Grantor is seised in Fee.*
SECT. 51. *For quiet Enjoyment.*
59. *Free from Incumbrances.*
61. *For further Assurance.*
66. *These Covenants run with the Land.*
70. *Are now usually restrained.*
74. *According to the Title of the Vendor.*
78. *Who are held to claim under the Vendor.*
84. *Who are bound to covenant for the Title.*
88. *Remedies under these Covenants.*
97. *Covenants in Assignments of Leaseholds.*
99. *Covenants for Production of Title Deeds.*
100. *Covenants for Renewal of Leases.*

SECTION 1. A covenant is *an agreement in a deed*, by which one person obliges himself to do something beneficial, or abstain from something which, if done, might be prejudicial to another; and a great variety of agreements of this kind have been introduced into modern deeds. (*a*)

2. A covenant is generally *an agreement to do* something *in futuro;* and differs from the case where an agreement refers to a thing which is not to be done by the person of any, but to a thing to be executed in itself; and where an agreement terminates in itself, it is not properly a covenant, but a defeasance. A covenant may, however, be *executed*, namely, that a thing *is already done.* (*b*)

(*a*) (Platt on Cov. p. 3. Randel *v.* Ches. Canal Co. 1 Harringt. 151, 233.)
(*b*) Plowd. 138. 1 Vent. 26. Shep. Touch. 162.

*3. A covenant *can only be created by deed;* but it *368 may be as well by *deed poll*, as by *indenture;* for the covenantee's *acceptance of the deed* is such an assent to the agreement as will render it *binding on him.* But the party must be named in the deed poll. (*a*)

4. Where lands are conveyed by indenture to two persons, and one of them does not seal the deed, yet, if he enters upon the land, and accepts of the deed, in other matters, he will be bound by the covenants contained in it.[1] And where an estate is lim-

(*a*) Green *v.* Horne, 1 Salk. 197. (Platt on Cov. p. 5.)

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[1] Whatever remedies may be administered *in equity*, against a person enjoying the benefit of a conveyance, to which he was not a party, the idea of supporting an action of *covenant, at law,* against one who never executed the deed, seems a violation of legal principles. The observations of Mr. Platt on this subject are so pertinent and sound, that no apology is necessary for their insertion in this place. "A proposition has been advanced, and received without scruple by the profession, that a person may, by certain acts of his own, such as his acceptance of an interest conveyed by a deed which he never executed, bind himself to perform all the covenants and conditions therein contained, as effectually as if he had in a formal manner sealed and delivered the instrument. This, it is to be observed, is totally independent of any custom or usage, or matter of record. As the position has been transcribed from book to book, and has at different times been adopted in the works of gentlemen highly distinguished for their legal attainments; 4 Cru. Dig. 393, 3d ed. s. 4; where the word *by* two persons is inserted instead of *to;* Com. Dig. Covenant, (A. 1); Vin. Abr. Condition, (I. a, 2); Dy. 13 b, pl. 66; 2 Rol. Rep. 63; recognized by Lord Coke, 3 Bulstr. 164; 1 Rol. Rep. 359; 2 Ibid. 63; Co. Lit. 230 b, note (1); by Butler. Co. Lit., by Thomas, Vol. II. p. 229, n. (F); Burnett *v.* Lynch, 5 Barn. & Cres. 596; S. C. 8 Dow. & Ry. 368. The author feels considerable diffidence in venturing to deviate from the beaten track, and to submit his own views in opposition to the opinions entertained by more experienced members of the profession; but the ground on which their opinion is founded, seems too much at variance with the broad, settled distinction between instruments under seal and those not under seal, and to clash too materially with the technical nature of an action of covenant, to be dismissed without some investigation of, and observations on the authorities cited in support of the position.

"The case referred to in almost all the books in favor of the doctrine, is to be found in Co. Lit. 231 a, and is as follows: 'An indenture of lease was engrossed between A., of the one part, and D. and R., of the other part, which purported to be a demise from A. to D. and R. A. sealed and delivered the indenture, and D. sealed the counterpart to A.; but R. did not seal and deliver it. And by the same indenture, it is mentioned that D. and R. did grant to be bound to the plaintiff in £20, in case certain conditions comprised in the indenture were not performed. And for this £20, A. brought an action against D. only, and showed forth the indenture. The defendant pleaded that it was proved by the indenture that the demise was made to D. and R., which R. was in full life, and not named in the writ. The plaintiff replied that R. never sealed and delivered the indenture, and so his writ was good against D. sole. And there the counsel of the plaintiff took a diversity between a rent reserved, which was parcel of

ited to a person for life, with a remainder to another, who is not

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the lease, and the land charged therewith, and a sum in gross, as here the £20 were; for as to the rent, they admitted, that by the agreement of R. to the lease, he was bound to pay it; but for the £20, that was a sum in gross and collateral to the lease, and not annexed to the land, and grew due only by the deed; and therefore R. said he was not chargeable therewith, for that he had not sealed and delivered the deed. But, inasmuch as he had agreed to the lease, which was made by indenture, he was chargeable by the indenture for the same sum in gross; and for that R. was not named in the writ, it was adjudged that the writ did abate.' And for this, 38 Ed. 3, 8 a; 3 H. 6, 26 b; 45 Ed. 3, 11, 42, are cited by Coke.

"That the case is good law there is no reason to doubt; but the misapprehension and misrepresentation of the kind of action, have been the occasion of the seeming error, into which the followers of Lord Coke have fallen. It will be observed, that in the passage just quoted, the words are: 'And for this £20, A. brought an action against D. only,' using the word *action* generally, without confining it to any particular class. On reference, however, to the Year Book, 38 Ed. 3, 8 a, from which the case is extracted, the form of the action proves to be *debt*, and not *covenant*. It is not necessary here to enter into an inquiry, whether *debt* could be maintained under the circumstances; (Lock *v.* Wright, 1 Stra. 570; S. C. 8 Mod. 40); it is sufficient to show that the case referred to does not warrant the position, that covenant can be supported against a party, who, without executing the deed, has availed himself of a benefit under it.

"The case in the Year Book, 3 H. 6, c. 26, (the former part of the case will be found, ibid. p. 18,) to which reference is made in Co. Lit., was also an action of *debt*, and related to the defeasance of an obligation. The object of the suit was to recover from one T. B. twenty marks, on his bond. The defendant pleaded a deed executed by the obligee, subsequently to the date of the bond, to one J. H., which recited the bond, and then *granted* that if the said J. H. should perform certain conditions, then the bond should be void. It was averred that J. H. had performed the conditions, and the question before the Court was, whether the defendant, being a stranger to the deed of defeasance, could by his plea take advantage of it. The case was twice argued, but ultimately judgment was given against the defendant, by three Judges, against the opinions of two dissentient, the Chief Baron being in favor of the plaintiff.

"How little this case bears upon the point is evident; but if it possesses any influence at all, it must be admitted, that the decision, denying the defendant, on the score of his being a stranger, the privilege of pleading the defeasance, militates against, rather than supports, the proposition advanced.

"Next in order in Co. Lit. is 45 Ed. 3, 11, 12; but this case has less relation to the question than the preceding. The plaintiff had leased a manor to a man and wife for the term of their lives, rendering twenty marks a year rent; and they *obliged* themselves that the plaintiff should have such surety for payment of the money as his counsel should devise. On their refusal, a writ of *covenant* was brought against them both, and on an objection that the wife should not have been joined in the action, the writ was quashed.

"The principal difficulty to be surmounted, is the sanction which the proposition appears to have received from a most profound lawyer and able Judge, in a very recent case, (Burnett *v* Lynch, 5 Barn. & Cres. 602. See likewise Staines *v.* Morris, 1 Ves. & B. 14); but when all the circumstances attending that recognition are considered,

a party to the deed; if the remainder-man enters, he will be bound by the covenants contained in the deed. (*a*)

5. The law has not appropriated any particular form of words

(*a*) 1 Inst. 231 a. *Ante*, c. 2, § 3.

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it is submitted, that the observation of Lord *Tenterden*, then Lord Chief Justice *Abbott*, is not conclusive on the point. The case was—the executors of a lessee for years assigned, by a *deed-poll*, the demised premises to one Lynch (the defendant) for the residue of the term, under and subject to the payment of the rent reserved by the original indenture, and the performance of the covenants therein contained, &c. Lynch took possession and occupied the premises under this assignment, and, before the expiration of the term, assigned over. The lessor sued the executors of the lessee for breaches of covenant committed during the time that Lynch continued assignee of the premises, and recovered damages against them. The question then before the Court, as far as our subject is concerned, was, whether an action on the case, founded on the tort, could be maintained against Lynch, for having neglected to perform the covenants during the time that he continued assignee, whereby the executors sustained damage; and it was determined that it could. In delivering his opinion, the Lord Chief Justice said (5 Barn. & Cres. 602):—'It has been contended, that if any action will lie, it must be an action of covenant. I think an action of covenant is not maintainable, for an action of covenant is of a technical nature. It cannot be maintained, except against a person who, by himself or some other person acting on his behalf, has executed a deed under seal, or who (*under some very peculiar circumstances, such as those mentioned in Co. Lit.* 231 *a*,) has agreed by deed to do a certain thing.' Now it is clear, that this observation is far from being a judicial determination of the point; and this is more apparent from the circumstance, that neither of the other Judges (Bayley, J., Holroyd, J., and Littledale, J.) in any way even alluded to the case in Co. Lit. The Lord Chief Justice, relying on counsel for the accuracy of their citations, was evidently misled by its being quoted as an action of covenant, (5 Barn. & Cres. 596;) and that, not from the fountain head, the Year Book, but from another quotation of the case, as founded on a writ of covenant, in an argument in 2 Rol. Rep. 63; and finding it impossible to reconcile the incongruity with the general principles and technical nature of an action of covenant, and believing that the case referred to was in covenant, and not in debt, treated it as an exception from the general rule.

"The general adoption of this error, if error it be, has manifestly been occasioned by the constant reference to the case as cited in Rol. Rep., instead of at once seeking the decision in the Year Book. Had the latter course been pursued, it is probable, that the case would not have been quoted in Burnett *v.* Lynch, in support of the position there contended for; nor have derived additional weight as an authority, that a person shall be liable in covenant, although he never executed the deed, in consequence of the notice taken of it by the Lord Chief Justice.

"The situation of a party taking an interest, by means of such an instrument, closely resembles that of a person to whom a conveyance has been made by deed-poll; and the author does not hesitate to assert, that no instance can be found of an action of covenant having been entertained by the Courts, against one claiming under a deed-poll. He has used every diligence in consulting the books, and has made frequent inquiries of his professional friends, but has not been able to discover any case, in which a lessor has come before the Court in an action of covenant against his lessee on

to the creation of a covenant; therefore *any words will be sufficient, which show the intention of the parties.*[1]

6. Thus, where A leased to B for years, upon condition that he should acquit the lessor of ordinary and extraordinary charges,

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a lease by deed-poll, and has had a decision in his favor. (†) On the contrary, it has been adjudged, that on a deed-poll mutual covenants cannot arise, as it is the deed of one party only. Lock *v.* Wright, 1 Stra. 571; S. C. 8 Mod. 40. And see Bidwell *v.* Lethbridge, 1 Barnard, 235; Sutherland *v.* Lishnan, 3 Esp. 42; Kimpton *v.* Eve, 2 Ves. & B. 353; Co. Lit. 363, b. Indeed, in Burnett *v.* Lynch, the Court expressly denied the liability of the assignee, on the ground of his not having executed the deed. And moreover, on a plea of *non est factum* in such a case, where the bare question is deed or no deed, it would seem impossible to establish an indenture against the defendant who never sealed, so as to render him liable in covenant.

"The above, then, are the cases on which this strange doctrine rests; two of them being actions of debt; 38 Ed. 3, 8 a; 3 H. 8, 26, 18 b; the third totally unconnected with the subject; 45 Ed. 3, 11, 12; and the last, it is humbly submitted, a mere *obiter dictum;* Burnett *v.* Lynch, 5 Barn. & Crès. 602; and the foregoing are the reasons which induce the author to maintain that an action of covenant can only be supported (with the exceptions above noticed, the one founded on custom, the other on a contract between the king and the subject, and a matter of record,) against a person, who by himself or some other person acting on his behalf, has executed a deed under seal.

"Perhaps, however, the doctrine has been too long sanctioned to be now reversed. At all events, it is an introduction of an equitable principle into a court of law; the acceptance of a deed being considered equivalent to an actual execution by the lessee. But as the point may admit of some reasonable doubt, it would be extremely unsafe in practice to dispense with the execution of an indenture by the lessee, on the assumption that his entry and enjoyment under the lease would, of themselves, be sufficient to expose him to an action of covenant, on breach of any of the covenants to be performed by him." See Platt on Covenants, p. 10–18.

[1] See, accordingly, Hallett *v.* Wylie, 3 Johns. 44, 48; Bull *v.* Follett, 5 Cowen, 170; Jackson *v.* Swart, 20 Johns. 85; Wright *v.* Tuttle, 4 Day, 321; Mitchell *v.* Hazen, 4 Conn. 508; Rigby *v.* Great Western Railw. Co. 14 M. & W. 811; Duke of St. Albans *v.* Ellis, 16 East, 352; Sampson *v.* Easterby, 9 B. & C. 505; Saltoun *v.* Houstoun, 1 Bing. 433. Whether an acknowledgment of indebtment by the grantee to the grantor, recited in a deed, amounts to a covenant to pay the money mentioned, will depend on the intention, to be collected from the other parts of the deed. If an intention to enter into an agreement to pay the money is apparent upon the face of the deed, it will be regarded as a covenant to pay. Courtney *v.* Taylor, 6 M. & G. 851. But if the acknowledgment appears to have been made solely for a collateral purpose, it is otherwise. Ibid. Thus, a recital of indebtment, in a deed conveying lands in consideration thereof, has been held not to amount to a covenant to pay. Anon. *v.* May, 2 Hayw. 127. See, as to the *proviso* in a mortgage deed, *ante*, tit. 15, ch. 1, § 14, note.

(†) The generality of the position in the text may not, at first sight, appear to be consistent with the subjoined cases, but on a strict examination of these authorities, the above proposition, it is submitted, will be found to be warranted to its fullest extent. Chancellor *v.* Poole, 2 Dougl. 764; Staines *v.* Morris, 1 Ves. & B. 14; Wilkins *v.* Fry, 1 Meriv. 266. From the imperfect report of Norris *v.* Elsworth, Freem. 463, it cannot be collected whether the lease was by deed-poll or indenture.

and should keep and leave the houses, at the end of the term, in as good a plight as he found them; it was held that these words created a covenant. (*a*)

7. Queen Elizabeth, by letters-patent, let a house to W. Cumberland, wherein were these words — "And the said lessee, his executors and assigns, *reparabunt domum prædictam*, and shall leave the said house so repaired," &c. The Court held, that these words in the Queen's patent amounted to a covenant on the part of the lessee; and he accepting the lease, was bound by it. (*b*)

8. If a lessee for years covenants to repair, &c., "*provided always, and it is agreed*," that the lessor shall find great timber, &c.; this makes a covenant on the part of the *lessor* to find great timber, by the word "*agreed;*" and shall not be a qualification of the covenant of the lessee. But if the lessee covenanted to repair, "*provided always*, that the lessor shall find great timber;" without the word "*agreed;*" this proviso would not create any covenant on the part of the *lessor*, but would only be a *qualification of the covenant of the lessee.* (*c*)

9. In articles of agreement, reciting an intended marriage, it was covenanted, that in consideration of the lady's portion, a jointure should be settled on her; and the conclusion was in these words: — "And it is hereby agreed, that a fine shall be * levied to secure the payment of the said portion." It was resolved, that these words created a covenant to levy a fine. For wherever there is an agreement under hand and seal, covenant lies. (*d*) *369

10. It was held, in a modern case, that where a person, for himself, his heirs, executors, &c., on the part and behalf of A. B., covenanted that the said A. B., his heirs, &c., should pay a sum of money, and seal the deed; he was personally bound by the covenant. (*e*)

11. If a man conveys land to another in fee, with "*warranty*," and after the land is evicted by elder title for certain years, the grantee of the land may have an *action of covenant* upon the said words, against the grantor, upon the eviction, though the war-

(*a*) Bro. Ab. Cov. pl. 4.
(*b*) Bret *v.* Cumberland, Cro. Jac. 399.
(*c*) Holder *v.* Tayloe, 1 Roll. Ab. 518.
(*d*) Hollis *v.* Carr, 2 Mod. 86. Id. 268.
(*e*) Appleton *v.* Binks, 5 East, 148. (Meyer *v.* Barker, 6 Binn. 228. Sumner *v.* Williams, 8 Mass. 162. Whiting *v.* Dewey, 15 Pick. 428.)

ranty be annexed to the freehold; for the said words make a covenant, if a chattel be evicted; and a warranty, if a freehold be demanded. (*a*) [1]

12. A *covenant* being part of a deed, is *subject to the general rules established for the construction of deeds;* as—I. To be always taken *most strongly against the covenantor*, and most in advantage to the covenantee. II. To be taken *according to the intent* of the parties. III. To be construed, *ut res magis valeat quam pereat.* IV. When no time is limited for its performance, it must be done within a *reasonable time.* (*b*)

13. There are some words which, when used in particular contracts, will create a covenant. Thus, the words "*grant*" or "*demise*," in a lease for years, *create a covenant in law, for quiet enjoyment* of the lands demised, during the term; so that if the lessee be evicted by the lessor, or by any other person claiming a lawful title to the land, he may bring an action thereupon.[2] So,

(*a*) Rudge *v.* Pincombe, 1 Roll. Ab. 519. Hob. 3. 1 Vez. 516.
(*b*) Shep. Touch. 166. (*Supra*, ch. 20.) T. Raym. 164.

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[1] See Pincombe *v.* Rudge, Hob. 3, note by Williams, (Am. ed.) The clearest statement of this case is in Yelv. 139.

[2] The words "*demise*" and "*grant*," in a lease for years, import a covenant that the lessor had authority to make a valid lease of the premises; Grannis *v.* Clark, 8 Cowen, 36, 41; and for quiet enjoyment; Barney *v.* Keith, 4 Wend. 502; Crouch *v.* Fowle, 9 N. Hamp. 219. But see Black *v.* Gilmore, 9 Leigh, 446, *contra.* And see acc. Frost *v.* Raymond, 2 Caines, 194; Holden *v.* Taylor, Hob. 12; 1 Saund. 322 *a*, note by Williams; Noke's case, 4 Rep. 80.

The word "*give*," *dedi*, in a feoffment, implies a covenant of warranty; but continuing only during the life of the feoffor. Frost *v.* Raymond, *supra;* Kent *v.* Welch, 7 Johns. 258; Vanderkarr *v.* Vanderkarr, 11 Johns. 122. But this covenant, it has been held, is not to be implied in conveyances which derive their operation from the Statute of Uses. Allen *v.* Sayward, 5 Greenl. 227. The word "*grant*" *concessi*, in an estate in fee, does not imply a warranty. Frost *v.* Raymond, *supra.* In this case, Kent, C. J., explains and qualifies the broad language of Lord Eldon, in Browning *v.* Wright, 2 B. & P. 21, that the words "*grant, bargain, sell, enfeoff, and confirm*," import a covenant in law. The words "*yielding and paying*," in a lease, make only an implied covenant to pay the rent; on which the lessee is not liable, after he has assigned his term. Kimpton *v.* Walker, 9 Verm. 191.

[The word "lease" implies a covenant for quiet enjoyment. Maule *v.* Ashmead, 20 Penn. (8 Harris,) 482; Bandy *v.* Cartwright, 20 Eng. Law & Eq. 88. A lease of a factory, containing machinery carried by water, grants by implication all the right to use water which the lessor had. Wyman *v.* Farrar, 35 Maine, (5 Red.) 64. In a general lease of a store, or warehouse, there is no implied warranty that the building is safe, well built, or fit for any particular use. Dutton *v.* Gerrish, 9 Cush. 89, 93. A clause in a lease that "the owner shall not be liable for any repairs on the premises

if a lease for years be made, reserving or "*yielding and paying*" a certain rent, these words will *create a covenant for payment* of the rent. (*a*)

(*a*) 4 Rep. 80 b. 5 Rep. 17 a. (Fraser *v.* Skey, 2 Chitty, R. 646. Line *v.* Stephenson, 5 Bing. N. C. 183.) Giles *v.* Hooper, Carth. 135. (Kimpton *v.* Walker, 9 Verm. 191.)

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during the term, the house being now in perfect order," has respect only to the condition of the house as an edifice in perfect repair, and not to the present or future purity of the air within it. Foster *v.* Peyser, 9 Cush. 242. The same case decides that in a sealed lease of a house for a private residence, there is no implied covenant that it is reasonably fit for habitation. The following is that portion of the opinion of the Court, by Metcalf, J. "This question has been discussed in numerous recent cases in England. But it is unnecessary to refer to more than one of them, viz., Hart *v.* Windsor, 12 Mees. & Welsb. 68, decided by the Court of Exchequer, in 1844. In that case, Mr. Baron Parke, after reviewing all the previous cases, clearly states the law on this point, and the grounds of it. And as his views are perfectly satisfactory to us, we shall merely quote the following passages from his opinion:—'It is clear that, from the word *demise*, in a lease under seal, the law implies a covenant,—in a lease not under seal, a contract,—for *title* to the estate merely; that is, for quiet enjoyment against the lessor, and all that come in under him, by title, and against all others claiming by title paramount during the term; and the word *let*, or any equivalent words, which constitute a lease, have, no doubt, the same effect, but no more. Shep. Touch. 165, 167. There is no authority for saying that these words imply a contract for any particular state of the property at the time of the demise; and there are many, which clearly show that there is no implied contract that the property shall *continue* fit for the purpose for which it is demised; as the tenant can neither maintain an action, nor is he exonerated from the payment of rent, if the house demised is blown down, or destroyed by fire. Monk *v.* Cooper, 2 Stra. 763; Belfour *v.* Weston, 1 T. R. 310; and Ainsley *v.* Rutter, there cited; or gained upon by the sea; Taverner's case, Dyer, 56 a; or the occupation rendered impracticable by the king's enemies; Paradine *v.* Jane, Aleyn, 26; or where a wharf demised was swept away by the Thames; Carter *v.* Cummins, cited in 1 Chan. Cas. 84. In all these cases, the estate of the lessor continues; and that is all the lessor impliedly warrants. It appears, therefore, to us to be clear, upon the old authorities, that there is no implied warranty on a lease of a house, or of land, that it is, or shall be, fit for habitation or cultivation.'—'We are all of opinion, for these reasons, that there is no contract, still less a condition, implied by law, on the demise of real property only, that it is fit for the purpose for which it is let. The principles of the common law do not warrant such a position; and though, in the case of a dwelling-house taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes,—for building upon, or for cultivation; and there would be no limit to the inconvenience which would ensue. It is much better to leave the parties, in every case, to protect their interests themselves, by proper stipulations, and if they really mean a lease to be void, by reason of any unfitness in the subject for the purpose intended, they should express that meaning."

The decision in the foregoing case has been recognized by the English Court of Common Pleas, in Surplice *v.* Farnsworth, 7 Man. & Grang. 576; by the Supreme Court of New York, in Cleves *v.* Willoughby, 7 Hill, 83; and is referred to as the settled law, in Addison on Contracts, 412; Archb. Land. & Ten. 67, 158; and 1 Platt on Leases, 613.

14. Lord Mansfield has observed, that the distinction between implied covenants, by operation of law, and express covenants,

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In the cases which were cited for the defendant, (except two or three *nisi prius* decisions, which are virtually, if not directly, overruled by Hart *v.* Windsor,) in which tenants have been allowed to withdraw themselves from the tenancy, and to refuse payment of rent, there was either fraudulent or erroneous description of the demised premises, or they became uninhabitable by the wrongful act or omission of the lessor.

When the contract of lease is silent, the law implies an obligation on the part of the lessee to use the property in a proper and tenant-like manner, without exposing the buildings to ruin or waste by acts of omission or commission, and not to put them to a use or employment materially different from that in which they are usually employed. Nave *v.* Berry, 22 Ala. 382. See Kemp *v.* Sober, 4 Eng. Law & Eq. 64; Broadway *v.* The State, 8 Blackf. 290; McKissick *v.* Pickle, 16 Penn. State R. 140; and Pickle *v.* McKissick, 21 Ib. 232; for decisions showing to what uses buildings granted or leased for a certain purpose, may, or may not, be put consistently with the terms or conditions of the grant or lease.

The term "unavoidable casualty" in a lease, comprehends only damage or destruction arising from supervening and uncontrollable force or accident, and signifies events or accidents which human prudence, foresight, and sagacity cannot prevent. Welles *v.* Castles, 3 Gray, 325.]

The grant of a watercourse, &c., implies a covenant on the part of the grantor, not to disturb the grantee in the enjoyment of it. Pomfret *v.* Ricroft, 1 Saund. 322, *per Cur.* [Hoyt *v.* Carter, 16 Barb. Sup. Ct. 212.] So, if a lease be made by indenture, reserving a right of way, common, or other profit to the lessor, a similar covenant is implied on the part of the lessee, not to disturb the lessor in the use of the profit reserved. Russell *v.* Gulwell, Cro. El. 657; Seddon *v.* Senate, 13 East, 63, 78, 79.

By the statutes of *New York*, *Michigan*, and *Indiana*, no covenants whatever can be implied in a deed of conveyance of real estate; whether there be express covenants or not. N. York Rev. Stat. Vol. II. p. 22, § 140; Mich. Rev. Stat. 1846, ch. 65, § 5; Indiana Rev. Stat. 1843, ch. 28, § 21.

In *Delaware*, it is enacted, that, when there is no express covenant in a deed, the words "*grant, bargain, and sell*," shall, unless specially restrained, imply a special warranty against a grantor, and his heirs, and all persons claiming under him. Del. Rev. St. 1829, p. 93, § 5.

In *Pennsylvania*, it is enacted that those words, in any conveyance in fee simple, shall be adjudged an express covenant that the grantor is seised of an indefeasible estate in fee, that the premises are free from incumbrances by the grantor, except rents and services due to the lord of the fee, and for quiet enjoyment against the grantor and his heirs, and all persons claiming under him; unless it be otherwise limited by express words. Dunlop's Dig. p. 63, 64. For the exposition of this covenant, see Gratz *v.* Ewalt, 2 Binn. 95; 3 Penn. Rep. 313; Funk *v.* Voneida, 11 S. & R. 109; Bender *v.* Fromberger, 4 Dall. 440; Seitzinger *v.* Weaver, 1 Rawle, 382; 1 S. & R. 50, 56, 60. A provision, substantially the same, is found in the statutes of *Arkansas*, Rev. St. 1837, ch. 31, § 1; *Alabama*, Rev. St. 1823, tit. 18, ch. 1, § 20; *Mississippi*, Rev. St. 1840; ch. 34, § 32; and *Illinois*, Rev. St. 1839, p. 555, § 2. [See Moseley *v.* Hunter, 15 Mis. 322.]

In *Missouri*, it is enacted that those words, in a deed in fee simple, if not otherwise

is, that *express covenants are taken more strictly;* for a man may, without consideration, enter into an express covenant, under hand and seal. (*a*)

15. [But the *implied covenant* upon the words "*granted and demised,*" in a lease for years, *determines with the estate and interest of the lessor.*

*16. Thus, where tenant for life, remainder over, by indenture demised to the lessee, his executors, &c., for the *370 term of fifteen years, without any express covenant for quiet enjoyment, and the lessee was evicted by the remainder-man after the death of the tenant for life, but before the expiration of the fifteen years; the Court of C. B. held, that the lessee could not maintain covenant against the executor of the tenant for life.] (*b*)

17. An *express covenant* will *qualify the generality of an implied covenant,* and restrain it so as that it shall not extend further than the express covenant.[1]

18. A person made a lease of a house, by the words "*demise, grant,*" &c., and the lessor covenanted that the lessee should enjoy the house during the term, without eviction by the lessor, or any claiming under him. The lessee was evicted by a person who did not claim under the lessor. It was held by Popham, Ch. Just., and all the other Judges, that the express covenant qualified the generality of the covenant in law, and restrained it by the mutual consent of both parties, that it should not extend further than the express covenant. (*c*)

(*a*) 3 Burr. R. 1639. (*b*) Adams *v.* Gibney, 6 Bing. 656.
(*c*) Noke's case, 4 Rep. 80 b. 1 Mod. 113. 1 Vez. 101. 2 Ves. 544. Woodhouse *v.* Jenkins, 9 Bing. 431.

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expressly restrained, shall be construed to be express covenants,—1. of seisin in fee; 2. of freedom from incumbrances by the grantor; 3. for further assurance.

[In *Mississippi*, the words "grant, bargain, and sell," in a deed of conveyance, of themselves import covenants of general warranty of title and against incumbrances, and for quiet enjoyment. Bush *v.* Cooper, 26 Miss. (4 Cush.) 599.]

[1] See acc. Line *v.* Stephenson, 5 Bing. N. C. 183; Blair *v.* Hardin, 1 Marsh. 232; Crouch *v.* Fowle, 9 N. Hamp. 219. Where a deed contains express covenants, other covenants may still be implied, at common law, provided they be not inconsistent with those which are expressed. Gates *v.* Caldwell, 7 Mass. 68; Sumner *v.* Williams, 8 Mass. 201, per Sewall, J.; Funk *v.* Voneida, 11 S. & R. 109; Roebuck *v.* Dupuy, 2 Ala. R. 535. But see Vanderkarr *v.* Vanderkarr, 11 Johns. 122; Frost *v.* Raymond, 2 Caines, 188, 192, where the general rule was stated *obiter*, that no covenants are to be implied, if any are expressed.

19. Where *several persons* enter into a covenant, they may either bind themselves *altogether*, or else they may only bind each of themselves *severally;* from which arises a *distinction* between *joint* and *several* covenants; and a covenant of this kind may also be *both joint and several.*

20. Where a person covenants with two or more, *and with each of them; if each of the covenantees takes a several interest or estate*, the *covenant is several;* but *if the covenantees take a joint interest* in the subject-matter of the covenant, it is a *joint covenant.*[1] As if a man by an indenture demises to A Black Acre, to B White Acre, and to C Green Acre, and covenants with them and every of them, that he is lawful owner of all the said acres; in that case, as the interests are several and distinct, the words "*every of them*," will make the covenant several. But if the three acres had been demised to them jointly, then the words, every of them, would have been void. For a man by his covenant, (unless in respect of several interests,) cannot make it first joint, and then several, by means of the words "*every of them.*" Because, although several persons may bind themselves, and every of them, and so the obligation shall be joint or several, at the election of the obligee; yet a man cannot bind him-
371* self to *three and to each of them, to make it joint or several at the election of several persons, for one and the

[1] Where *joint* words may be taken *severally*, see Windham's case, 5 Rep. 8; Veal *v.* Roberts, Cro. El. 199; Eccleston *v.* Clipsham, 1 Saund. 153, and notes (1,) (2,) by Williams; Harold *v.* Whitaker, 10 Jur. 1004; Clark *v.* Bickers, 9 Jur. 678; Mills *v.* Ladbrooke, 7 M. G. 218; 8 Jur. 247.

The following are cases of covenants adjudged joint. Sorsbie *v.* Park, 12 M. & W. 146; Hopkinson *v.* Lee, 6 Ad. & El. 964, N. S.; Bradburne *v.* Botfield, 14 M. & W. 559; Wakefield *v.* Brown, 10 Jur. 853. Where the words of a covenant are *expressly joint*, it will be so construed, though the interest may be several; and *vice versâ;* but where the words are ambiguous in this respect, they may be construed to be joint or several, according to the interest. Sorsbie *v.* Park, 12 M. & W. 146.

[Westcott *v.* King, 14 Barb. Sup. Ct. 32; Buckner *v.* Hamilton, 16 Ill. 487. Where a lease was made by several owners of a house, reserving rent to each one in proportion to his interest, and the lessees covenanted to keep the premises in good repair, &c.; such covenant is joint as respects the lessors, and one of them cannot maintain an action for the breach of it by the lessees. Calvert et al. *v.* Bradley et al., 16 How. U. S. 596, 599. Mr. Justice Daniel, in this case, reviews at considerable length the authorities.

When the legal interest in a covenant and in the cause of action thereon is joint, the covenant is joint, although the covenant in its terms be several, or joint and several. This was a covenant in articles of copartnership. Capen *v.* Barrows, 1 Gray, 376.]

same cause; for the Court would be in doubt for which of them to give judgment; also the covenantor would be several times charged with one and the same thing; and therefore the words, "*and every of them*," are in such case of no effect, and do not sever the joint cause of action. (*a*)

21. If two lessees covenant *jointly and severally, at the beginning of a lease*, these words will *extend to all their subsequent covenants*; notwithstanding the intervention of covenants on the part of the lessor.

22. In a lease of coal mines, made by the Duke of Northumberland to G. Errington and John Ward, there was a string of covenants introduced by these words—" And the said G. Errington and J. Ward for themselves jointly and severally, and for their several and respective heirs," &c.; and then came a proviso in these words:—" And it was thereby declared by and between the said parties, and the said Duke did thereby covenant, that it should be lawful for the lessees to sell a certain quantity of a particular sort of coals, they, the said G. Errington and J. Ward, paying and accounting to the Duke for the same." An action was brought by the Duke against the executors of G. Errington, upon these words; and the question was, whether they amounted to a several covenant. It was determined that the general words at the beginning of the covenants by the lessees, "jointly and severally, in manner following," extended to all their subsequent covenants, which were, therefore, all joint and several. (*b*)

23. Covenants are divided into *real* and *personal*. *Covenants real* are those which have for their object something annexed to, or inherent in, or connected with land, or other real property.[1]

(*a*) Slingsby's case, 5 Rep. 18. Jenk. 262. Eccleston *v.* Clipsham, 1 Saund. 153. Johnson *v.* Wilson, Willes, 248.

(*b*) Northumberland *v.* Errington, 5 Term Rep. 522. Anderson *v.* Martindale, 1 East, 497.

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[1] The doctrine of covenants real was very fully discussed by Ld. Brougham in Keppell *v.* Bailey, 2 My. & K. 517. In that case, it appeared, that certain land-owners and owners of iron works, and among others the lessees of the Beaufort Works, had formed a joint stock company, and under powers given them by a special statute, had constructed a railroad, connecting the Trevil lime quarry with the several iron works and with the railroads of the Monmouthshire Canal Company. In the partnership deed of the railroad company, the lessees of the Beaufort Works covenanted for themselves and their heirs and assigns, with the other shareholders and their heirs and assigns, that, so long as the covenantors, their heirs and assigns, should occupy the Beaufort Works, they would procure all the limestone used in their said works from the lime

Thus, where three coparceners purchased land in fee, and covenanted that *the survivors should convey* to the heirs of such as should die first; this was resolved to be a covenant real. (*a*)

(*a*) 1 Inst. 384. 6 Jenk. 241.

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quarry mentioned, and convey the same, and also all the iron-stone, from the mines to their works, along the Trevil railroad, at a specified rate of tolls. Upon a bill filed by the shareholders of the railroad to enforce this agreement, against a person who had purchased the Beaufort Works, with notice of the partnership deed, it was *held*, that the covenant did not run with the land, so as to bind assignees at law; and that a Court of Equity would not, by holding the conscience of the purchaser to be affected by the notice, give the covenant a more extensive operation than the law allowed to it.

In considering the question before him upon general principles, previous to his examination of the cases on the subject, the Lord Chancellor made the following observations:—"There are certain known incidents to property and its enjoyment; among others, certain burdens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner; all which incidents are recognized by the law. In respect of possession, the property may be in one, while the reversion is in another; in respect of interest, the life-estate in one, the remainder in tail in a second, and the fee in reversion in a third. So in respect of enjoyment, one may have the possession and the fee simple, and another may have a rent issuing out of it, or the tithes of its produce, or an easement, as a right of way upon it, or of common over it. And such last incorporeal hereditament may be annexed to an estate which is wholly unconnected with the estate affected by the easement, although both estates were originally united in the same owner, and one of them was afterwards granted by him with the benefit, while the other was left subject to the burden. All these kinds of property, however, all these holdings, are well known to the law and familiarly dealt with by its principles. But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of a public as well as of a simple nature, and no one who sees the premises can be ignorant of what all the vicinage knows. But if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his property with further obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations upon the premises, besides many other restraints as infinite in variety as the imagination can conceive; for there can be no reason whatever in support of the covenant in question, which would not extend to every covenant that can be devised.

"The difference is obviously very great between such a case as this, and the case of covenants in a lease, whereby the demised premises are affected with certain rights in

24. It was held, in Spencer's case, that when a covenant extends to a thing in *esse*, parcel of the demise, the thing to be

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favor of the lessor. The lessor or his assignees continue in the reversion while the term lasts. The estate is not out of them, although the possession is in the lessee or his assigns. It is not at all inconsistent with the nature of property, that certain things should be reserved to the reversioners, all the while the term continues; it is only something taken out of the demise, some exception to the temporary surrender of the enjoyment; it is only that they retain, more or less partially, the use of what was wholly used by them before the demise, and what will again be wholly used by them when that demise is at an end. Yet even in this case the law does not leave the reversioner the absolute license to invent covenants which shall affect the land in the hands of those who take by assignment of the term. The covenant must be of such a nature as 'to inhere in the land,' to use the language of some of the cases; or, 'it must concern the demised premises and the mode of occupying them,' as it is down in others; 'it must be *quodammodo*, annexed and appurtenant to them,' as one authority has it; or, as another says, 'it must both concern the thing demised, and tend to support it and support the reversioner's estate.' Within such limits, restraints upon the land demised may be imposed, which shall follow it into the hands of persons who are strangers to the contract of lease, and who only become privy to the lessor through the estate which they take by assignment in the demised premises. But this is no more than saying that, within such limits, the owner of the land may retain to himself and his assignees of the reversion a certain control over, or use of, the property which remains in himself, or which he has conveyed to those assignees, and that he may so retain it into whose hands soever, as lessee, the temporary possession may have come. Even he, the continuing owner, is confined within certain limits, by the view which the law takes of the nature of property; and if beyond those limits he were to imagine a stipulation, the covenant in which he should embody it would not run with the land, but only bind the lessee personally and his representatives.

"It only requires a little attention to the cases, to satisfy us, first, that even where the privity of lessor and lessee exists, there are bounds so narrow to the province of real covenants, as would make the one in question lie on the extreme verge of it, if it did not fall without it; secondly, that there can be no doubt of such a covenant being one personal, collateral, or in gross, where there does not exist that, or some other privity of estate, which, according to one or two of the authorities only, and which I venture to doubt, has been held to render real, covenants which would otherwise have been personal; and thirdly, that those covenants which have been held real, excepting, indeed, such as relate to title, would have been deemed collateral, had there been no privity in respect of reversion or other unity of title."

It is clear, therefore, that *covenants real* must, 1st, have *real estate* for their *subject;* and must affect the land, or the mode of occupying and enjoying it, immediately, and not remotely. Platt on Covenants, p. 63; Shep. Touchst. 161; Mayor of Congleton *v.* Paterson, 10 East, 130. They must affect the nature, quality, or value, or mode of enjoying the thing conveyed, independent of collateral circumstances. 10 East, 135. 2dly. They must *run with the land;* that is, accompanying the *seisin;* and be *prospective* in their operation. If there is no seisin, or nothing passes by the deed, or the covenant is *in præsenti*, it is merely personal. Spencer's case, 5 Rep. 16; Slater *v.* Rawson, 1 Met. 450. It is not sufficient that the covenant concerns *land;* there must be a *privity of estate* between the parties. Webb *v.* Russell, 3 T. R. 393, 402, per Ld. Kenyon.— 3dly. Their *object and design* is either, 1. *To preserve the inheritance;* or, 2. To *continue*

done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised. But when the covenant extends

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the relation of tenant or grantee, &c.; or, 3. To *protect the tenant or grantee* in the enjoyment of the estate. Thus, for example, of the *first class* are covenants to *keep in repair.* Lougher *v.* Williams, 3 Lev. 92; Demarest *v.* Willard, 8 Cowen, 206; *to insure;* if the premises are to be reinstated with the insurance money; Vernon *v.* Smith, 5 B. & Ad. 1, per Best, J.; *to reside* in the demised premises during the term; Tatem *v.* Chaplin, 2 H. Bl. 133; *not to establish any other mill on the same stream;* Norman *v.* Wells, 17 Wend. 136; *not to erect a building* on the opposite grounds; Watertown *v.* Cowen, 4 Paige, 510; Mann *v.* Stephens, 10 Jur. 560; to *convey coals* on the premises *along the landlord's railway* thereon; Hemingway *v.* Fernanded, 13 Sim. 228; to place and maintain the *centre of party walls upon the dividing line,* at the mutual expense of the adjoining owners. Savage *v.* Mason, 3 Cush. 500. And a covenant by the lessee of tithes, not to let certain farmers have any of the tithes without the lessor's consent in writing, was held a covenant real, running with the tithes; and binding assignees, though they be not named; *quia transit terra cum onere.* Bally *v.* Wills, 3 Wills. 25, 29. But a covenant *to build* houses on the land has been deemed only personal. Doughty *v.* Bowman, 12 Jur. 182; 16 Law Journ. 414.

Of the *second class,* are covenants *to pay rent;* Stevenson *v.* Lambard, 2 East, 575; Holford *v.* Hatch, 1 Doug. 183; *to do suit to the lessor's mill;* the lessor continuing to own both the mill and the reversion; Vivyan *v.* Arthur, 1 B. & C. 410; 5 Rep. 18; *to renew the lease;* Spencer's case, Moor, 159; 5 Rep. 16 a; 12 East, 469.

Of the *third class* are covenants *to warrant and defend;* Shep. Touchst. 161; Marston *v.* Hobbs, 2 Mass. 433; Wiltby *v.* Mountfort, 5 Cowen, 137; *to make further assurance;* Middlemore *v.* Goodale, Cro. Car. 503; *to remove incumbrances;* Sprague *v.* Baker, 17 Mass. 586; *to release suit and service;* 1 Inst. 384 b; *to produce title-deeds;* Barclay *v.* Raine, 1 Sim. & Stu. 449; 10 Law Mag. 353–357; *for quiet enjoyment;* Noke *v.* Awder, Cro. El. 373, 436; Campbell *v.* Lewis, 3 B. & Ald. 392; Hunt *v.* Amidon, 4 Hill, 345; Shelton *v.* Codman, 3 Cush. 318; *to supply the premises with water;* Jordain *v.* Wilson, 4 B. & Ald. 266; *to open a street* on which the land is bounded; Dailey *v.* Beck, 6 Pa. Law Journ. 383; *never to claim or assert title to the premises;* Fairbanks *v.* Williamson, 7 Greenl. 97; Somes *v.* Skinner, 3 Pick. 52; *to pay all costs, charges, and expenses, except taxes;* Torrey *v.* Wallis, 3 Cush. 442; *to draw off the covenantor's mill-pond,* at stated seasons, to enable his grantee to obtain mud; Morse *v.* Aldrich, 19 Pick. 449. And see further, 2 Greenl. Evid. § 240.

So, where the lessee of land under letters-patent, covenanted with his under lessee to apply for and use his best endeavors to procure a renewal of them, this was held to extend to the payment of a reasonable fine for renewal, and to run with the land. Simpson *v.* Clayton, 4 Bing. N. C. 758. So, a covenant by the lessee, in a lease under seal, to pay all costs, charges, and expenses, except the yearly taxes, is a covenant running with the land, and therefore binding on an assignee. Torrey *v.* Wallis, 3 Cush. 442. And where the heir apparent, with the approbation of his ancestor, released his estate in expectancy, with a covenant never to claim the premises; after which the ancestor died, having devised the land to the heir; this was held a covenant real, which attached to the land on the death of the ancestor, the title then enuring to the grantee. Trull *v.* Eastman, 3 Met. 121.

But where the husband and wife make a lease of her inheritance, and the lessee covenants with the husband alone to repair, it seems that this covenant does not run with the land. Wooton *v.* Steffenoni, 12 M. & W. 129. And where one sold a portion of his

to a thing which is not in being at the time of the demise *made, it cannot be appurtenant or annexed to the thing which hath no being. But if a lessee covenants *to repair the houses* demised to him during the term; that is parcel of the contract, and extends to the support of the thing demised, and therefore is *quodammodo* annexed to the houses. (*a*) *372

25. A granted a *watercourse* to B and his heirs, through Black Acre and White Acre; and covenanted for himself, his heirs and assigns, *to cleanse the same;* and that fines and recoveries levied, &c., of the said grounds, should be and enure to confirm, &c. Afterwards a recovery was had, and a deed executed, declaring the uses as aforesaid. The Court held, that this was a covenant real, and made good by the recovery. (*b*)

26. A, tenant in fee simple, granted a *rent charge* out of lands, and covenanted for himself and his heirs *to pay* it without deduction. Lord Raymond held, that this was a personal covenant; but the three other Judges held, that this was a covenant real, being in the nature of a grant; or at least a declaration going along with the grant, showing in what manner the thing granted should be taken. (*c*)

(*a*) 5 Rep. 16. (*b*) Holmes *v.* Buckley, 1 Ab. Eq. 27.

(*c*) Brewster *v.* Kitchin, 1 Ld. Raym. 317. 12 Mod. 171. Bally *v.* Wills, 3 Wils. R. 25. Taten *v.* Chaplin, 2 H. Black. 133.

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land, the grantor and grantee entering into mutual covenants not to erect on their respective grounds buildings for certain purposes deemed offensive, nor any houses if less than a certain value; and afterwards the grantor contracted with a stranger for the sale of his remaining portion of the land in fee simple, clear of incumbrances: it was held that the grantor's title was too doubtful to be forced upon the purchaser. Bristow *v.* Wood, 9 Jur. 99.

In Kingdon *v.* Nottle, 1 M. & S. 355; 4 M. & S. 53, it was held that the covenant of seisin in fee was a covenant real. But this was shown to be contrary to the law in England, as well as in the United States, in Mitchell *v.* Warner, 5 Conn. 497; and again in Clark *v.* Swift, 3 Met. 390; [Allen *v.* Little, 36 Maine, (1 Heath,) 170.] In *Ohio*, a distinction has been taken, and this covenant held to attach to and run with the land, where the grantor is in possession, claiming title, at the time of the conveyance; but that if he is not in possession, and the title is defective, it is personal. Backus *v.* McCoy, 3 Ohio R. 211. [A covenant of warranty does not run with the land. Blydenburgh *v.* Cotheal, 1 Duer, (N. Y.) 176. See, *contra,* Carter *v.* Denman, 3 Zabr. 260.].

For further learning on the subject of covenants real, the student is referred to the notes of Mr. Smith, and of Mr. Hare, to Spencer's case, in 1 Smith's Leading Cases, p. [27]—[39], 79–108, 2 Am. ed.; where it is treated with learned research and acute discrimination. These covenants are also briefly reviewed in his own lucid manner, by Chancellor Kent, in 4 Kent, Comm. p. 469–480. [Savage *v.* Mason, 3 Cush. 500, 505, note.]

27. The *essential difference* between a real and a personal covenant is that a *real covenant runs with the land*, and extends to all who claim the land under the grantee, for it descends to the heir, and is also transferred to a purchaser. Therefore, where a covenant real is entered into by a grantee or lessee, it will not only bind such grantee or lessee, but also his assignee; and the grantor or lessor, or his heir, may at any time bring an action on such covenant. (*a*)

28. Thus, where in a lease for years the lessee covenanted with the lessor, his executors, and administrators, *to repair and leave in repair at the end of the term;* in an action of covenant brought by the heir, it was objected that it lay not for him; but it was answered, that it was a covenant running with the land, and should go to the heir, though not named; and it appeared that it was intended to continue after the death of the lessor, his executor being named. (*b*)

29. But where the lessor was only tenant for life, it was held, that his heir was not entitled to the benefit of covenants made with the lessor; because the lease determined by his death. (*c*)

30. As the assignees of grantees or lessees are bound by all covenants real, annexed to the estate granted or leased, 373* and * which run with the land; so are they entitled to the benefit of all such covenants as are entered into by the grantors or lessors; and may maintain an action on them. (*d*)

31. Thus, in Spencer's case, it was resolved, that if a person made a lease for years, by the words "*grant*" or "*demise*," which create a covenant *for quiet enjoyment;* and the *assignee* of the lessee was evicted, he *should have a writ of covenant.* For it was but reasonable that he should have such benefit of the demise, as the original lessee might have had; and the lessor had no other prejudice than that to which his special contract with the original lessee bound him. (*e*)

32. By the statute 32 Hen. VIII. c. 34, s. 2, it is enacted, that all feoffees and grantees of any lordships or hereditaments, for years, life, or lives, shall have the like action and remedy against all persons having reversions of such lordships or here-

(*a*) 1 Will. 4, c. 47. Spencer's case, *ante*, s. 24. 1 B. & Ald. 105. 5 B. & Ald. 1.
(*b*) Lougher *v.* Williams, 2 Lev. 92.
(*c*) Brudnell *v.* Roberts, 2 Wils. 143.
(*d*) 1 Inst. 384 a.
(*e*) 5 Rep. 17 a.

ditaments, for any covenants contained in their leases, as they might have had against the lessors or grantors, their heirs or successors. (*a*)

33. A Court of Equity will give its assistance to an assignee, against all persons claiming under the grantor of an estate, to procure for him the benefit of the covenants contained in the original grant, and which run with the thing granted.

34. Thus in the case of Holmes *v.* Buckley, the watercourse by mesne assignment came to the plaintiff; and Black Acre and White Acre to the defendant, who built on the same, and much heightened the ground that lay over the watercourse, by which it became more chargeable and inconvenient to repair; and, as it was alleged, and in part proved, the building had much obstructed the watercourse. So the bill was for establishing the enjoyment of the watercourse; and that the defendant, and all claiming under him, might from time to time cleanse the same, according to the covenant. It was objected, that the covenant being personal, was not at all strengthened by the recovery; and that the plaintiff, and all those under whom he claimed, being sensible of it, had for forty years cleansed the same at their own charge. The Court was of opinion, that this, being a covenant which ran with the land, was made good by the recovery; and though the plaintiff had cleansed the same at his own charge, whilst it was easy to be done; yet since the right was plain upon the deed, and the cleansing made *chargeable by the building, it was reasonable the de- *374
fendant should do it; and decreed accordingly. (*b*)

35. If, however, the tenant be not assignee of the whole term, he is then in fact only *an under-tenant*, and is *not liable* to an action for the breach of any of the covenants contained in the original lease.

36. An action of covenant was brought for rent in arrear, against the defendant, as assignee to one Saunders. On the trial it appeared that the defendant was in the possession of the premises, during the time when the rent in arrear became due; but that, by the deed under which he held, they were conveyed to him by Saunders for a day or two less than the original term.

(*a*) *Vide* tit. 13, c. 2, s. 50. (1 Chitty Plead. 106. 5 Am. ed.)
(*b*) *Ante*, s. 25. Jourdain *v.* Wilson, 4 Barn. & Ald. 266.

For the plaintiff it was contended that the covenant for rent, being one of those which runs with the land, every person who took under the original lease, was liable to it. To this purpose the defendant, although he had not strictly taken the whole of the lessee's interest, in point of duration, was to be considered as his assignee. A devisee, an executor, and assignee under the bankrupt laws, or one who purchased a term from the sheriff under an execution, were assignees in law, to the effect of being liable to covenants for rent, &c.; although the transfer to them did not amount to a forfeiture, under a covenant not to assign. The landlord was entitled to look for the rent to the person in possession, and ought not to be driven to the necessity of finding out the original lessee, and bringing his action against him. (*a*)

On the other side it was insisted, that there was not a better known distinction in the law than that between an assignee and an under-tenant. Only assignees of the whole term, whether by actual assignment, or by devise, sale under execution, &c., are liable to the covenants for rent, &c.; for if there was a reversion of a day reserved by the immediate lessor, there was no privity between the under-tenant and the first lessor.

Lord Mansfield said, this was an action of covenant by a lessor, against an under-lessee; and the single question was, whether the action could be maintained against him, as being substantially an assignee. For some time the Court had great doubts; they had bestowed a great deal of consideration on the subject, and looked fully into the books; and it was clearly settled, and was agreeable to the text of Littleton, that the action could not be maintained, unless against an assignee of the whole term.

375* *37. It was determined, in a subsequent case, that where the whole of a term is assigned, and no reversion is left in the assignor, though the rent be reserved to the original lessee, and not to the lessor, the assignee will be entitled to the benefit of the covenants contained in the original lease.

38. An action of covenant was brought by the plaintiff, an assignee of a term, against the defendant, as assignee of the lessor, for not providing proper timber for repairs. It was objected, that when the original lessee assigned over the term, the rent was

(*a*) Holford *v.* Hatch, 1 Doug. 182.

reserved to such lessee, and to the lessor; and that the covenants, in the assignment made by the original lessee, were not the same with those in the original lease. On the other side it was contended, that wherever the whole interest is conveyed, it is an assignment; and that in such a case the assignee stood exactly in the place of the lessee, and was entitled to the benefit of all the covenants inserted on the part of the lessor. (*a*) The Court was of this opinion, and gave judgment accordingly.

39. Although *assignees are liable* to all the covenants that run with the land, yet *that circumstance will not discharge the assignors*, where they are the *lessees*, from an action on those covenants.

40. An action of covenant was brought by the lessor of a house, against the lessee, for not repairing it, after warning given. The defendant pleaded, that long before the warning, he had assigned over his term to J. S., from whom the plaintiff afterwards received rent. It was determined, that the action against the lessee was maintainable, notwithstanding the assignment, and acceptance of rent. (*b*)

41. It has been shown, that covenants real descend to the heirs of the grantors, who may at any time bring an action upon them, though not named, as in the case of Lougher *v.* Williams. But no stranger could take advantage of a covenant of this kind; so that the grantees of reversions could not enforce the performance of any covenants, contained in leases made by the persons under whom they derived. To remedy this the statute 32 Hen. VIII. c. 34, was made, which has been already stated; and which extends to covenants, as well as to conditions; it being thereby enacted, that *the grantees and assignees of reversions* shall have such like and *the same advantages*, by action only, *for not performing the covenants contained in the said *376 leases, as the lessors or grantors themselves, or their heirs or successors, might have had. (*c*)

42. The general resolutions, made on the construction of this statute, having been already stated, it will be sufficient to observe here, that *this act extends only to covenants which concern the thing demised*, and not to collateral covenants. For the intent of the

(*a*) Palmer *v.* Edwards, 1 Doug. 186 n.
(*b*) Barnard *v.* Godscall, Cro. Jac. 309. 1 T. R. 94, 98.
(*c*) *Ante*, s. 28. Tit. 13, c. 2, s. 50.

statute was not to transfer any privity of contract, but to annex the covenants, concerning the lands demised, to the reversion; so that they might pass as incident, and annexed to such reversion. (*a*)

43. In a modern case, it was resolved by the Court of King's Bench, and affirmed in the Exchequer Chamber, that if a mortgagor and mortgagee make a lease, in which the covenants for the rent and repairs are only with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants; because they are collateral to his grantor's interest in the land; and therefore do not run with it. And Mr. Serjeant Shepherd, in arguing this case, stated that there were three relations at common law, which might exist between a lessor and lessee, and their respective assignees. First, privity of contract; which was created by the contract itself, and subsisted forever between the lessor and lessee. Secondly, privity of estate; which subsisted between the lessee or his assignee, in possession of the estate, and the assignee of the reversioner. And thirdly, privity of contract and estate; which existed where both the term and reversion remained in the original covenantors. The statute 32 Hen. VIII., seemed to have created a fourth relation; a privity of contract in respect to the estate, as between the assignees of the reversion, and the lessees, or their assignees. The statute annexed or rather created a privity of contract between those who have privity of estate; and when the one fails, the other fails with it. (*b*)

44. Covenants are again divided into *general* and *specific*. A covenant to *settle lands of a certain value*, is a *general* covenant which *does not bind any particular lands* of the covenantor; but a covenant to *settle particular lands* is a *specific* covenant, and *a lien on those lands*.

45. A person owed debts by bond and by simple contract, and upon his marriage had covenanted to settle his lands in
377 * Rumney * Marsh, and also lands that should be of the value of £60 per annum, upon his wife for life. After which he made a will, thereby charging all his real and personal estate with the payment of his debts, and died. (*c*)

(*a*) Tit. 15, c. 2, s. 51. 5 Rep. 18 a. Thursby *v.* Plant, 1 Saund. 237.

(*b*) Webb *v.* Russell, 3 Term R. 393. 1 H. Black. 562. Campbell *v.* Lewis, 3 Barn. & Ald. 392.

(*c*) Freemoult *v.* Dedire, 1 P. Wms. 429.

On a bill brought by the creditors for the satisfaction of their several debts, Lord Parker said,—" With regard to the lands in Rumney Marsh, the marriage articles, being a specific lien on them, made the covenantor, as to them, but a trustee; and therefore, during the life of the wife, they are not to be affected by any of the bond debts. But the covenant for settling lands of the value of £60 per annum on the wife, does not specifically bind any lands. Wherefore, as touching that, the wife must come in only as a specialty creditor."

46. In all ancient feoffments, the feoffor entered into a general *warranty* for the title. But warranties of this kind have been *long disused*, and a set of *covenants for securing the title* have been *substituted in their stead;* which are now generally inserted in all conveyances, as being in some respects more beneficial to the grantees, and affording a more easy remedy, in case of a defect in the title, than could be obtained under the ancient warranty.

47. By the *first* of these, the grantor covenants for himself, his heirs, executors, and administrators, with the grantee, his heirs, and assigns, that he the grantor is *lawfully seised in fee simple* of the premises conveyed. And by the *second* that he has *good right and full power to convey* the same.

48. It appears to have been formerly doubted, whether these clauses constituted two several covenants or only one. But the *better opinion* appears to be, that they constitute *two several and independent covenants;*[1] for although, if the vendor be seised in

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[1] The covenants of seisin in fee, and of good right to convey, are called *synonymous*, because the same fact, the seisin of the covenantor, which will support the first, will also support the other covenant. Marston *v.* Hobbs, 2 Mass. 437, per Parsons, C. J. In American deeds, the covenant of freedom from incumbrances is usually inserted between them. [In Massachusetts, a covenant in a deed of a "good right to sell and convey" does not imply a warranty of absolute title, but only of actual seisin and possession. Raymond *v.* Raymond, 10 Cush. 134.]

The covenant of seisin in fee extends only to a title existing in a third person, other than the covenantee, and which might defeat the estate granted. Fitch *v.* Baldwin, 17 Johns. 161. If the grantor is in the exclusive possession of the premises, claiming a fee, this covenant is satisfied; Marston *v.* Hobbs, 2 Mass. 433; Pearce *v.* Jackson, 4 Mass. 408; even though his title were acquired by wrong, and is defeasible. Twombly *v.* Henley, 4 Mass. 441; Prescott *v.* Trueman, Ibid. 627; Chapell *v.* Bull, 17 Mass. 213; Hacker *v.* Storer, 8 Greenl. 228, 232. The mere possession of the premises by third person, unless it be also adverse, does not constitute a breach of this covenant. Commonwealth *v.* Dudley, 10 Mass. 403. But if it be adverse, nothing passes by the

fee, he has power to convey; yet the converse of this proposition does not hold, for a person may have power to convey, though not seised in fee. Thus, where a tenant in tail conveys to a person to make him tenant to the *præcipe*, in order that a common recovery may be suffered to the use of a purchaser in fee; or where a person conveys under a power, the covenant is, that the grantor has good right to convey, and the first covenant is omitted. (*a*)

49. A person covenanted that he was seised of Black Acre in fee simple, whereas, in truth, it was copyhold in fee. The Court held it was a breach of covenant, and the jury should give 378* damages, *in their consciences, according to the rate at which the country valued fee simple land more than copyhold. (*b*)

50. Two men and their wives joined in a grant of their wives' lands, being parceners; and covenanted that they and their wives had good right to convey the lands. It was affirmed, for breach, that one of the women was under age, and died; and that the right of the lands descended to her son, an infant; and so the estate of a moiety was devested out of the plaintiff. This was held to be a breach of the covenant. (*c*)

51. By the *third* of these covenants, the grantor formerly covenanted that the grantee, his heirs and assigns, should *enjoy the premises* granted, *without the eviction or disturbance* of the grantor or his heirs, *or of any other person whatever.*[1] And it was held

(*a*) Trenchard *v.* Hoskins, Winch. 91. Lit. Rep. 203. Sid. Rep. 328. (Gainsford *v.* Griffith, 16 Vin. Abr. 206, pl. 4, n.

(*b*) Gray *v.* Briscoe, Noy, 142.

(*c*) Nash *v.* Aston, T. Jones, 195.

deed, until the possession be abandoned, or its adverse character be done away. Porter *v.* Perkins, 5 Mass. 233. And if, in the mean time, the grantee sues the grantor and has judgment for breach of this covenant, he can never hold the land, even against his grantor, without a new purchase. Porter *v.* Hill, 9 Mass. 34.

If the deed contains a covenant of seisin, and also a special and qualified warranty, excepting from its operation certain claims, the two covenants must be taken together, and the last will be held to qualify and restrain the first. Cole *v.* Hawes, 2 Johns. Cas. 213. *Supra*, ch. 21, § 62, note. But a covenant of warranty is not equivalent to a covenant of seisin; though it is equivalent to a covenant for quiet enjoyment. Caldwell *v.* Kirkpatrick, 6 Ala. R. 60.

[1] In the United States, the covenant for *quiet enjoyment* is not unfrequently used; but more generally, instead of it, the practice is to insert a covenant to *warrant and defend* the premises to the grantee, either specially, against the grantor and all persons claim-

that this extended to all evictions whatever. Thus, it was resolved in 15 & 16 Eliz., that where a person made a lease for a

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ing by, through, or under him, or, "against the lawful claims and demands of all persons." But this covenant is in fact and in essence a covenant for quiet enjoyment; on which no action lies until the grantee is disturbed in that enjoyment, by an eviction or *ouster.* Emerson *v.* Prop'rs of Minot, 1 Mass. 464; Marston *v.* Hobbs, 2 Mass. 438; Kelley *v.* Dutch Church, 2 Hill, N. Y. Rep. 105; Sisson *v.* Seabury, 1 Sumn. 263. This covenant applies only to titles existing at the time of executing the deed, and to evictions under such titles. Ellis *v.* Welch, 6 Mass. 246. But the covenantee is not bound to wait until he is evicted by judgment at law; he may yield possession to a paramount title, or extinguish it by purchase, and then resort to his remedy on the covenant. The only difference between the two courses, is, that if evicted by a suit at law, of which his warrantor had due notice and which he was required to defend, the judgment and sheriff's return of the eviction, and the proof of notice to the warrantor, are alone sufficient to maintain the action of covenant; whereas, if the party has yielded to an *ouster*, without suit, he takes on himself the burden and peril of proving that the title to which he yielded was paramount to his own. Hamilton *v.* Cutts, 4 Mass. 349; Sprague *v.* Baker, 17 Mass. 586; Prescott *v.* Trueman, 4 Mass. 627; [Parker *v.* Dunn, 2 Jones' Law R. (N. C.) 203.]

This covenant of general warranty against all persons, if the grantor had no title at the time, estops him from afterwards claiming title to the land. For it is a general principle, deducible from all the authorities, that an instrument, which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title, from the moment such estate comes to the grantor. Somes *v.* Skinner, 3 Pick. 52, 60, per Parker, C. J.; Jackson *v.* Bull, 1 Johns. Cas. 81, 90; Jackson *v.* Matsdorf, 11 Johns. 91; Jackson *v.* Murray, 12 Johns. 201; Jackson *v.* Wright, 14 Johns. 193; Jackson *v.* Stevens, 16 Johns. 110, 115; Nash *v.* Spofford, 10 Met. 192; Lewis *v.* Beard, 3 M'Lean, 56; Jackson *v.* Hoffman, 9 Cowen, 271. And the principle equally applies against all others, claiming in privity with the grantor. Kimball *v.* Blaisdell, 5 N. Hamp. 533; Wark *v.* Willard, 13 N. Hamp. 389. And see Lawry *v.* Williams, 1 Shepl. 281; White *v.* Patten, 24 Pick. 324; McKenzie *v.* Lexington, 4 Dana, 129; Phelps *v.* Blount, 2 Dev. 177; Van Horne *v.* Crain, 1 Paige, 455; Middlebury College *v.* Cheney, 1 Verm. 336.

But a covenant of special warranty, against the grantor only, and all persons claiming under him, does not estop him or them from setting up another title, subsequently acquired, whether by purchase or descent, or otherwise. Comstock *v.* Smith, 13 Pick. 116; Jackson *v.* Winslow, 9 Cowen, 13. [Sweetzer *v.* Lowell, 33 Maine, 446; Bell *v.* Twilight, 6 Foster, (N. H.) 401; Wedge *v.* Moore, 6 Cush. 8; Miller *v.* Ewing, 6 Ib. 34; Wight *v.* Shall, 5 Ib. 56; Cross *v.* Robinson, 21 Conn. 379; Glen *v.* Gibson, 9 Barb. Sup. Ct. 634; Coakley *v.* Perry, 3 Ohio, (N. S.) 344; Smith *v.* Branch Bank, 21 Ala. 125; Valle *v.* Clemens, 18 Mis. (3 Bennett,) 486; Frink *v.* Darst, 14 Ill. 304. Nor can such covenant be extended by parol to a general warranty against a title from other sources. Raymond *v.* Raymond, 10 Cush. 134.

The grantee in a deed poll is not estopped to deny that the grantor had such an estate as he undertook to convey. Great Falls Co. *v.* Norster, 15 N. H. 412. Nor does the taking of a deed of land which sets forth as its boundary on one side "the land of A," estop the grantee from denying the title of A to such adjoining

term of years, and covenanted that the lessee should enjoy the premises during the term, without the eviction or interruption of any person; this extended to a tortious eviction. (*a*)

52. This doctrine has, however, been long since exploded; and it has been settled, that the law will never adjudge a person to covenant against the wrongful acts of strangers, unless his covenant is express to that purpose; for the law itself defends every one against wrong. And therefore, though a person should covenant in the most general terms, for the title to lands, yet *such covenant will not be held to extend to tortious entries;* for if a purchaser is tortiously evicted or disturbed, he has his remedy at law; and if he is legally evicted, he has his action on the covenant. Whereas, if general covenants for a title should be construed to extend to tortious evictions, a way might be opened for secret practices and combinations, between a purchaser and strangers; that the purchasers might recover damages from the covenantors. And this construction has been confirmed in the following modern case. (*b*)

53. A person conveyed certain lands in the province of New York, in America, to a purchaser, in consideration of £1200; and covenanted, that the purchaser should enjoy the lands without the let, trouble, hindrance, &c., of the vendor, or his heirs, and of every other person or persons whomsoever. The States of America seized the lands, for an act done previous to the
379 * *conveyance.[1] An action was brought in the Court of King's Bench, at Westminster, on this covenant; and upon a demurrer, the Court was of opinion, that the action did not lie; for even a warranty, which was conceived in terms more general than this covenant, had been restrained to lawful interruptions. (*c*)

54. But where the covenant is to *save the purchaser harm-*

(*a*) Mountford *v.* Catesby, 3 Dyer, 328 a.

(*b*) Vaugh. 122. 2 Saund. R. 178 a, n. 8. 181 a, n. 10. (Tisdale *v.* Essex, Hob. 34. Ellis *v.* Welch, 6 Mass. 250.)

(*c*) Dudley *v.* Folliott, 3 Term R. 584. Noble *v.* King, 1 H. Black. 34.

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land. *Ib.* A grantor's covenant of seisin, or for further assurance, will not estop his heirs from asserting a title not derived from him. Chauvin *v.* Wagner, 18 Mis. (3 Bennett,) 531.]

[1] The lands here were declared forfeited, by a statute passed in 1776, the owner being a "royalist." The deed was made in 1780.

less from all acts of a particular person, there the vendor is bound to defend the purchaser against the entry of *that person, whether by title or not.*

55. Thus, where a lessor covenanted to save harmless the lessee concerning the premises, and the profit thereof to be received, against J. D., parson of S.; afterwards the lessee was ejected by J. D. without title; the covenant was held to be broken. (*a*)

56. So, where the covenant is against *all claims to a particular right*, it will extend to *tortious*, as well as to *legal* claims.

57. The defendant leased to the plaintiff a farm called Dale, and there being a pretence of a right of common set up to two closes, comprehended in the lease, the lessor covenanted with the lessee, that he should quietly enjoy the said two closes, against all claiming or pretending to claim any right in them. Upon this covenant the lessee brought his action, and assigned his breach, that such a one, having or pretending to have a claim, time out of mind, did enter upon the said closes. To this the defendant demurred; and it was insisted by his counsel, that the covenant only extended to legal, not tortious claims; and therefore that the plaintiff should have set forth, that the claim of him who disturbed him was a legal one. But the Court was of opinion, that the words of the covenant did extend to all interruptions whatsoever, and so was the plain intent and meaning of the parties; for if it was to extend to legal claims only, then would the tenant be put under the hardship of trying the right for the landlord; which was the very thing the tenant plainly designed to prevent by the covenant. Judgment for the plaintiff. (*b*)

58. Where lands are conveyed to *particular uses*, instead of a covenant for quiet enjoyment, the words *usually* inserted are, that *the estates conveyed shall be and remain to the uses thereby declared*, without any eviction, &c.

*59. By the *fourth* of these covenants the lands are *380 declared to be *free from all incumbrances.*[1] And in 17

(*a*) Foster *v.* Mapes, Cro. Eliz. 212.
(*b*) Chaplain *v.* Southgate, 10 Mod. 384.

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[1] The grantor is liable on this covenant, notwithstanding the grantee *knew* of the

Ed. IV. it was held, that if a person covenanted with another to acquit him of all charges issuing out of the land, and after, by Parliament, the tenth part of the value, out of the issues of all lands, was given to the King, the covenant should not extend to this. But if Parliament had given the tenth part *exitum terræ*, the covenant would have extended to this, as well as to rents, commons, and such like things, wherewith the land is charged. (*a*)

60. In an action of debt upon a bond, where the condition was, that the defendant should keep harmless the plaintiff from all jointures, dowers, annuities, damages, claims, and all other incumbrances; and should perform a covenant contained in a certain indenture, whereby the defendant conveyed to the plaintiff and his heirs a messuage and lands, &c.; and by the same deed covenanted, that the plaintiff should have, use, possess, and enjoy the premises aforesaid, quietly and peaceably, without any impediment from the defendant, his heirs or assigns, or any other person; and that clearly acquitted and exonerated of and from all former and other grants, &c., rents, rent charges, arrears of rent, statutes, charges, and incumbrances whatsoever; the plaintiff assigned for breach, that the tenements were charged and chargeable with a rent of 11*s.* 6*d.*, to be paid to the lord of the manor of W., of whom the said tenements were held, under the said rent and other services. The defendant, by his rejoinder, said that the rent of 11*s.* 6*d.* aforesaid was payable

(*a*) Bro. Ab. Grant, 164. Shep. Touch. 167.

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existence of the incumbrance at the time when the deed was executed. Townsend *v.* Weld, 8 Mass. 146. As, for example, where a public highway existed across the land. Ibid.; Harlow *v.* Thomas, 15 Pick. 66, 70; Kellogg *v.* Ingersoll, 2 Mass. 97. So, an inchoate title to dower is an incumbrance. Porter *v.* Noyes, 2 Greenl. 22. So is any other paramount right. Prescott *v.* Trueman, 4 Mass. 627. But an outstanding mortgage is not an incumbrance, if the grantee is bound to discharge it. Watts *v.* Wellman, 2 N. Hamp. 458.

More generally speaking, "every right to, or interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee of it by the conveyance, must be deemed in law an incumbrance." Prescott *v.* Trueman, 4 Mass. 629, per Parsons, C. J.

This covenant, being *in præsenti*, is not a covenant real, and therefore is not assignable. Clark *v.* Swift, 3 Met. 390. [By statute in Maine, such covenants pass to the assignee of the grantee, and he may maintain an action for their breach. Allen *v.* Little, 36 Maine, (1 Heath,) 170.]

to the lord of that manor, as a quit rent, incident to the tenure of those lands; and that the plaintiff was not molested for any arrears of that rent, payable before the making of the indenture aforesaid. The plaintiff maintained his replication, and the defendant his rejoinder; and upon this there was a demurrer; and the question was, if this covenant was broken. And it was resolved by the whole Court, without any difficulty, that it was. For the defendant had expressly covenanted with the plaintiff upon his purchase, that he should have the land discharged of all rents; and therefore they ought to be discharged of this rent, as well as of all others; for a quit rent is a rent; and judgment was given for the plaintiff. (*a*)

61. By the *fifth* of these covenants, the grantor binds himself and his heirs *to make all such further assurances of the* **lands, as shall be lawfully and reasonably required by the* *381 *grantee or his heirs, or their counsel.*[1]

62. It was resolved, in 35 Eliz., that, if a man bargains and sells lands in fee, and covenants to make further assurance, as *the counsel* of the bargainee shall advise, the bargainee himself, though he be learned in the law, cannot devise the assurance, but some of his counsel must devise it. (*b*)

63. It was resolved, in 29 & 30 Eliz., that, where a person was bound to make such assurance in the law as the *counsel of the obligee*, upon request made, should advise; and after J. S. was of counsel with the obligee, and *gave his advice to the obligee*, that the obligor should make a certain assurance; and the *obligee gave notice to the obligor* of the said advice, and required him to perform it; he ought to perform it, otherwise the condition is broken. For it was more convenient that the counsellor should give his advice to the obligee, than to the obligor. (*c*)

64. Where a man is bound to make such assurance as A or his heirs, or their counsel, shall devise; A, or his heirs, must take care that in time they have an assurance reasonably drawn, and

(*a*) Hammond *v.* Hill, 1 Com. Rep. 180. (*b*) Rosewell's case, 5 Rep. 19 b.
(*c*) Higginbottom's case, 5 Rep. 19 b.

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[1] After the grantee, or his counsel, has devised such further assurance, the grantee is bound to give notice thereof to the grantor. Miller *v.* Parsons, 9 Johns. 336.

ready to be sealed, and to tender it to him that is to seal it; for till then, there can be no breach of covenant. (*a*)

65. There is a clause in the register acts, 6 Ann. c. 35, s. 30, and 8 Geo. II. c. 6, s. 35, by which deeds of bargain and sale of lands lying in the east and north ridings of Yorkshire, may be enrolled there, and that the words "*grant, bargain, and sell,*" in such deeds, shall operate as *covenants for the title.* (*b*)

66. *Covenants for the title are real,* and pass to the heirs of the purchaser, and also to all persons claiming under him, who may maintain actions upon them against the vendor or his heirs,[1] and also against his executors or administrators.† Nor is it material whether the purchasers acquire their estates by common-law conveyances, or by those derived from the Statute of Uses.

67. The defendant, by indenture, enfeoffed J. S. of certain lands, and covenanted for himself and his heirs, with the feoffee, his heirs and assigns, to make further assurance upon request; which lands J. S. conveyed to the plaintiff, who brought an action on the covenant, because the defendant did not levy
382* a fine * upon the plaintiff's request. All the Court agreed that the covenant went with the land, and that the assignee, at the common law, or at least by the statute, should have the benefit thereof. (*c*)

68. Rachel Boyes and her son conveyed a copyhold estate to a mortgagee, by lease and release, and covenanted for further assurance. The son died; and the mortgagee filed his bill against the customary heir of the son, who was an infant; praying that he might be decreed to surrender the estate to the plaintiff. The Master of the Rolls (Sir R. P. Arden) said, he was clearly of opinion that this covenant was a contract for a valuable consideration, affecting the land, and would affect the heir. And by the decree, it was declared that the covenant in the mortgage deed bound the land descended to the defendant. (*d*)

(*a*) Shep. Touch. 167. Heron *v.* Treyne, 2 Ld. Raym. 750. (*b*) *Infra*, c. 29.
(*c*) Middlemore *v.* Goodale, Cro. Car. 503. Derisley *v.* Custance, 4 Term R. 75.
(*d*) Spencer *v.* Boyes, 4 Ves. 370.

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1 As to the liability of *heirs*, upon the covenants of the ancestor, see *ante*, tit. 1, § 58, note, and *supra*, ch. 8, § 10, note.

† [And by the stat. 1 Will. 4, c. 47, §§ 7, 8, against his devisees in the same manner as against the heirs.]

69. Covenants entered into *by a purchaser with the vendor, respecting the land,* or *any thing issuing out of, or annexed to the land,* will also *run with it,* and charge the heirs; and also the assignees of the purchaser, provided there is a privity of estate between them. But although there be a privity of estate at the time of the covenant, yet, if a subsequent purchaser does not take the estate of the original purchaser, he will not be bound by the covenant; because there is no privity between him and the original vendor. (*a*)

70. *Covenants for the title* to lands have long ceased to be general, and *are now usually restrained and qualified* according to the nature of the vendor's title; sometimes to the acts of the vendor himself, sometimes to those of himself and his immediate ancestors. And although, where covenants are several and of distinct natures, restrictive words annexed to one of them, will not be applied to the others; yet, where all the covenants have the same object, and restrictive words are annexed to the first of them, those words will be considered as extending to all the others. (*b*)

71. In an action of covenant, the plaintiff declared, on a feoffment of lands, wherein the defendant's testator covenanted, I. That, notwithstanding any thing by him done, he was *seised in fee,* &c., without any condition, &c.; II. That he had *full power to sell;* III. That the lands were *clear of all encumbrances* *by him or his father; and, IV. That the *feoffee* *383 *should enjoy* against all persons claiming under him, his father and grandfather; and assigned the breach, that the testator had no power to sell. Upon demurrer, it was agreed that these were *distinct covenants;* and three Judges, against North, Chief Justice, held, that when, by the first, he only covenanted against his own acts, it could never be intended that immediately, by another covenant of the same effect, he would covenant against the whole world. (*c*)

72. In a conveyance of an estate in fee, the vendor, after warranting the lands to the vendee and his heirs, against himself and his heirs, covenanted that, notwithstanding any act done by him to the contrary, he was seised in fee, &c.; and that he had

(*a*) Roach *v.* Wadham, 6 East, 289.
(*b*) *Infra,* s. 74. Crayford *v.* Crayford, Cro. Car. 106.
(*c*) Nervin *v.* Munns, 3 Lev. 46. Broughton *v.* Conway, Dyer, 240.

good right, full power, and lawful authority to convey and assure the same to the vendee, and his heirs and assigns, in manner aforesaid. The vendee was evicted by a person claiming under a title paramount to that of the vendor. An action of covenant was brought by the vendee against the representatives of the vendor; and it was contended, upon his part, that the words *good right*, *full power*, &c., extended to all persons whatever, and consequently, that the vendee was entitled to recover his purchase-money. But the Court held that these words were either a part of the special covenants, or, if not, that they were qualified by all the other special covenants, which restrained the covenants to the acts of the vendor and his heirs, and those claiming under him. (*a*)

73. In a conveyance of lands, made in 1783, the releasors covenanted that for and notwithstanding any act, &c., by them, or any or either of them, done to the contrary, they had good right to convey; and also that they, or some or one of them, for and notwithstanding any such matter or thing as aforesaid, had good right and full power to grant, &c.; and likewise, that the releasee should peaceably and quietly enter, hold, and enjoy the premises granted, without the lawful let or disturbance of the releasors or their heirs or assigns, or for or by any other person or persons whatsoever; and that the releasee should be kept harmless and indemnified by the releasors and their heirs, against all other titles, charges, &c., save and except the chief rent issuing and payable out of the premises to the lord of the fee. (*b*)

384 * * The Court of King's Bench held, that the generality of the covenant for quiet enjoyment against the releasors and their heirs, and any other person or persons whatever, was not restrained by the qualified covenants for good title and right to convey, for and notwithstanding any act done by the releasors to the contrary. (*c*)

74. With respect to the *restrictions annexed to the usual covenants for the title*, in modern conveyances, Mr. Fearne says: "Regularly, a *vendor who purchases lands himself, with proper covenants* from those who convey to him, *cannot reasonably be*

(*a*) Browning *v.* Wright, 2 Bos. & Pul. 13. (1 Poth. Obl. n. [102,] by Evans.) Nind *v.* Marshall, 1 Brod. & B. 319. Foord *v.* Wilson, 2 Moore, 592.

(*b*) Howell *v.* Richards, 11 East, 633.

(*c*) Barton *v.* Fitzgerald, 15 East, 530. Smith *v.* Compton, 3 B. & Adol. 189.

required to covenant further than against himself and those claiming under him. This is a practice founded in reason, where the vendee obtains the full benefit of all the covenants in the conveyance to the vendor, to the same extent as his vendor had them, by obtaining the possession of the deeds containing those covenants. When the vendor has parted with his means of claim or remedy against his grantor, for breach of his covenants, and transferred them to the purchaser, by delivery of the deeds, and such vendee comes into the vendor's place in that respect, by the acquisition of such deeds, it would be unreasonable that the vendor should make himself liable for any such breach. He, by departing with the means of remedy or compensation, must be understood to have discharged himself from, and the vendee, by accepting those means, to have taken upon himself, the peril or risk of such breach, and the duty of enforcing its remedy or compensation." (*a*)

75. There are *some exceptions to this rule;* for *where the title deeds are not delivered up to the vendee,* the covenants should extend to the acts of the person from whom the vendor purchased the estate. Thus, Mr. Fearne, in the opinion, of which a part has been already transcribed, proceeds in these words: — "But this principle, I think, does not apply to those cases where the vendor does not depart with, nor the vendee acquire, the deed containing the covenants for the title against the acts of such grantors; whilst the vendor retains in his own hands the immediate means of indemnity, which he thought proper to require of his grantor, it seems but reasonable that he should engage for the like indemnity to his own vendee, and rely upon the indemnity he has obtained for his own counter security. It is not, I think, sufficient to say that the covenant to produce his purchase deeds will *entitle the vendee to the benefit thereof, *385 when produced. Such a covenant cannot ensure the production of them, which may be prevented by accidents, for which the vendor, in whose custody the deeds are, ought to be the sufferer, rather than the vendee; who, by not having such possession, could not in any degree be accessary to the occasion of their loss, or by any means or care have prevented it. There seems more reason, on the other side, to say, it is sufficient for

(*a*) Fearne, Post. Works, 110. (Platt on Cov. p. 388–399.)

the vendor that, when called upon by the covenants entered into by him to the vendee, for enjoyment, &c., he has his remedy over to the same extent, upon his grantors; of which, as he retains the means in his custody, he is bound to look to the preservation of those means, and liable to the resort to, and due enforcement of them, and to bear the consequence of their loss." (†)

76. It would be impossible to lay down such a general rule, on this subject, as would be applicable to the variety of cases that may occur in practice; but it follows, from the principles stated by Mr. Fearne, that *where the vendor makes his title by descent*, and his ancestors have been in possession of the estate for *upwards of sixty years, he ought to covenant*, not only against his own acts, (which every vendor is bound to do,) but also *against the acts of all his ancestors.* Where the estate has been purchased by an ancestor of the vendor within sixty years, who obtained proper covenants for the title from the person of whom he purchased, the vendor (giving up the title deeds) is only bound to covenant against the acts of such purchasing ancestor, and of those intermediate ancestors through whom the estate has been transmitted to him. And where the vendor has himself purchased the estate, and has obtained proper covenants for the title, he is only bound (giving up the title deeds) to covenant against his own acts; for in each of these cases the purchaser will, by the possession of the title deeds, have a regular series of covenants to protect his title, up to that period when the statutes of limitations will secure him against all claims whatever.

77. *Where the vendor derives his title under a will*, or *a voluntary conveyance without any covenants for the title*, he is *bound to covenant against the acts of the devisor or grantor.* And where an estate is sold, by persons who have no beneficial interest, such as *trustees*, or *assignees of a bankrupt*, they are *only*
386* **bound to covenant, that they have done no act to encumber the estate.* But where there is a *defect in the title*, a purchaser *has a right to covenants against all persons, claiming*

[† Upon the above opinion of Mr. Fearne, Sir Edward Sugden observes: — "This, however, is *a distinction never attended to in practice;* if a vendor is entitled to retain the deeds, he enters into the usual covenant for their production, but never enters into more extensive covenants for the title, on account of the retention of the deeds." Sugd. V. & P. 452, c. 9, s. 4.]

a lawful title to the estate. And where a purchaser consents to take a defective title, relying for his security on the vendor's covenant, this should be particularly mentioned to be the agreement of the parties; for otherwise, as the defect was known, it might be contended that the covenants for the title should not extend to warrant it against such particular defect. (*a*)

78. With respect to *the persons who are held to claim under or through the vendor*, or any of those against whose acts the vendor covenants, or by their default; it was resolved in 20 Jac. 1, that if a person purchased lands to himself and his wife, and to his heirs in fee, and then made a lease for years of them to J. S., and covenanted that the lessee should quietly hold and enjoy the premises, without the let of the lessor, his heirs, or assigns, or of any other person, by or through his or their means, title, or procurement; and after the lessor dies, and his wife enters and disturbs the lessee, the covenant is broken; for her claim is by means of her husband. (*b*)

79. In this case, Mr. Justice Doddridge said, if a tenant in tail, to whom the estate tail was made, created an estate, and covenanted as before, and the issue ousted the covenantee, the covenant was broken; because, being his purchase, the descent to his issue was by his means, though not by his title. But if the issue made an estate, and covenanted in the same manner, and the issue of the issue entered, it was not broken, because they were in, not by his means, but by descent. So, if there was a lessee for life, with a remainder over, and the lessee made an estate, and covenant, and died, and the person in remainder entered, the covenant was not broken, because he was in by the feoffor, not by the lessee. But if a person enfeoffed another, upon condition to be reënfeoffed for life, with remainder over, there it would be otherwise, because by his procurement and means. (*c*)

80. A person made a lease for life, and covenanted for himself and his heirs, that he would save the lessee harmless from any *claiming by, from, or under him. The lessor died, *387 and *his wife* brought a *writ of dower* against the lessee, and recovered; the lessee brought an action of covenant against the heir. It was adjudged against the heir, because the wife claimed under her husband, who was the lessor. But if the

(*a*) Loyd *v.* Griffith, *infra*, § 85.
(*b*) Butler *v.* Swinerton, Palm. 339. Cro Jac. 657.
(*c*) Palm. 340.

woman had been *mother of the lessor*, who demanded dower, *the action would not have lain* against the heir; because she did not claim by, from, or under the lessor. And so it was adjudged. (*a*)

81. A person whose *title is derived under a deed of revocation, and appointment of new uses*, is considered as a person *claiming by or through the appointor.*

82. Sir John and Lady Astley levied a fine of Lady Astley's estate, to the use of Sir John for life, remainder over; with a power to Sir John to make leases, and a joint power of revocation. They afterwards revoked the uses, subsequent to the estate for life and power of leasing to Sir John Astley, and appointed new ones, to Lady Astley for life, with intermediate remainders, remainder to Lord Tankerville in tail. Sir John Astley afterwards made a lease, not warranted by his power; and covenanted that the lessee should enjoy the premises, without any interruption from him, or any person or persons claiming or to claim, by, from, or under him. When Lord Tankerville's estate came into possession, he took advantage of the defect in the lease, and evicted the lessee; who brought his action upon the covenant against the executors of Sir John Astley; they pleaded that Lord Tankerville, at the time of his entry into the premises, and evicting the plaintiff, did not claim, nor was entitled to the premises by, from, or under Sir John Astley. (*b*)

Lord Mansfield said, justice was strongly with the plaintiff; that as Sir John Astley was a necessary party to the second declaration of uses, by which the estate was limited to Lord Tankerville, his lordship certainly claimed under him, within the meaning of this covenant; that undoubtedly Sir John had covenanted against his own acts, and the new limitations were created by one of his acts. Judgment was given for the plaintiff.

83. Where a person conveyed an estate, and covenanted with the vendee for quiet enjoyment, without any eviction or interruption by the vendor, or any person claiming under him, or by, through, or with his, their, or any of their acts, means, 388* default, * or procurement; and a *quit rent* was payable out of the lands, which became due before the vendor came into possession, but was *in arrear at the time of the sale;* it was

(*a*) Anon. Godb. 333. Palm. 340.

(*b*) Hurd *v.* Fletcher, 1 Doug. 43.

held to be a breach of the covenant. And Lord Ellenborough said, if it were in arrear in the vendor's lifetime, it was a consequence of law that it was by his default, in respect of the party with whom he covenanted to leave the estate unincumbered (*a*)

84. *All persons who convey lands in their own right*, and for a *valuable consideration*, are *bound to enter into the usual covenants for the title;* and when the practice of conveying or devising lands to *trustees*, *upon trust to sell*, became frequent, it was laid down as a rule among conveyancers, that *the persons entitled to the money* to arise from such sale, were *bound to enter into the usual covenants for the title;* for as they had the beneficial interest in the land, they were considered, in equity, as the real owners of it.[1]

85. T. Loyd devised certain estates in the Isle of Anglesea, and county of Caernarvon, to trustees; upon trust, out of the rents and profits thereof, or by selling or mortgaging the same, to raise such sums as should be sufficient to discharge a mort-

(*a*) Howes *v.* Brushfield, 8 East, 491.

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[1] A covenant "*to execute a deed* to the purchaser, his heirs and assigns forever," is satisfied by executing a conveyance or assurance which may be good and perfect without warranty or personal covenants. Van Eps *v.* Schenectady, 12 Johns. 436, 442. So, if the covenant be to give "*a good and sufficient deed for the premises*," it relates merely to the validity and sufficiency of the conveyance, in point of law, to pass whatever right the covenantor had in the lands. Gazley *v.* Price, 16 Johns. 267. This case, which seems to overrule Clute *v.* Robinson, 2 Johns. 595, 613, where a similar covenant was held to require a conveyance carrying with it a good and sufficient *title* to the lands, was followed in Tinney *v.* Ashley, 15 Pick. 546, and in Parker *v.* Parmele, 20 Johns. 130.

But if the covenant be "*to give a good and sufficient deed in law to vest the purchaser with the title*" to the land; as in Jones *v.* Gardner, 10 Johns. 266; see 16 Johns. 269; or to "*make a warranty deed, free and clear of all incumbrances;*" as in Porter *v.* Noyes, 2 Greenl. 22; or, to sell and convey a parcel of land, "*the title to be a good and sufficient deed;*" as in Brown *v.* Gammon, 2 Shepl. 276; or, to execute a proper deed for conveying the fee simple of the lands, with full covenants; see Traver *v.* Halsted, 23 Wend. 66; or, to make "*a lawful title;*" as in Clark *v.* Redman, 1 Blackf. 380; [or, "to execute good and sufficient deeds of conveyance." Cunningham *v.* Sharp, 11 Humph. 116; Fitch *v.* Casey, 2 Greene, (Iowa,) 300.] In these and the like cases, it is necessary that the deed be sufficient, both in respect to its form and to the title of the grantor, to vest the legal estate absolutely in the grantee, free and clear of all incumbrances. And see Dearth *v.* Williamson, 2 S. & R. 498; Withers *v.* Baird, 7 Watts, 227.

[Where there was a covenant to make and execute "a good and sufficient warranty deed in fee simple, to be signed by himself and wife," it was held that the covenant was not fulfilled by tendering a deed signed by himself and wife, but not acknowledged by the wife. Stevens *v.* Hunt, 15 Barb. Sup. Ct. 17.]

gage affecting an estate which the testator had settled by deed on Mrs. Hester Webb, as also all his just debts. Upon a bill for carrying the trusts of the will into execution, the estates in Anglesea and Caernarvon were sold for £27,000, and a draft of the conveyance was prepared by Mr. Booth, as counsel for the purchaser, to which Mrs. Webb was a party, and made to enter into the usual covenants for the title. The counsel for the grantors, Mr. Weldon, together with Mr. Lane, objected to the draft, and gave their opinion that Mrs. Webb was not bound to enter into any covenants for the title. The draft was again referred to Mr. Booth, who supported his former opinion; and contended, that where a person devised an estate to trustees, upon trust to sell and pay over the money to J. S., and the trustees contracted with a purchaser for the sale of the estate; there J. S., the devisee of the money, who had the real beneficial interest in the estate, must covenant for the title; and that this was every day's practice. The Master, to whom the draft of the conveyance was referred, reported, that Mrs. Webb was not bound to enter into covenants for the title. (*a*)

389 * * Upon exceptions being taken to this report, Lord Hardwicke made the following order:—

"Let the exception be allowed, and let the Master alter the draft of the conveyance, by inserting therein proper covenants from Mrs. Webb, against her own acts, and the acts of Mr. Thomas Lloyd her devisor, as to so much as she would be benefited by the estate."

86. In a modern case, where an estate was devised to trustees, upon trust to sell it for payment of debts, and the interest of the residue of the money was given to several persons for life, and after their deaths, the principal to go to their children, it was decreed, that the purchaser was not entitled to covenants for the title, from the persons who took life-estates; but still the practice of the profession is, to make all those, whose shares of the purchase money are in any wise considerable, join in covenants for the title, to the extent of their respective interests. (*b*)

87. Where *all the money*, to arise from the sale of an estate, *is to be applied in payment of debts*, a purchaser can only require

(*a*) Loyd *v.* Griffith, 3 Atk. 264.
(*b*) Wakeman *v.* Duchess of Rutland, 3 Ves. 223, 504. 8 Bro. Parl. Ca. 145.

a covenant from the trustees or devisees, that *they have done no act to encumber.* And it is the same where a purchase is made from the *assignees of a bankrupt.*

88. With respect to the *remedies* which purchasers have under these covenants, they are of *three kinds:* I. Where the estate is *evicted.* II. Where it is *encumbered.* III. Where the *defect* in the title may be *supplied by some further act.* As to the *first,* where a purchaser is *evicted* by any person claiming under the vendor, or any of those against whose acts the covenants extend, he may maintain an action of covenant for the restoration of his money. But if the express covenants be not broken, he cannot get back his money.

89. An administrator, having found, among the papers of the deceased, a mortgage for £1200, assigned it over to a stranger, in consideration of the said sum of £1200, which was paid to him; and in the deed of assignment the administrator covenanted that neither the deceased, nor himself, had done any act to encumber the mortgaged estate. The mortgage deed turned out to have been forged; and after six years had elapsed, the assignee brought an action of *assumpsit* against the administrator, for money had and received to the plaintiff's use. The * defendant pleaded the general issue; and the Statute of Limitations. The plaintiff replied, and stated that the recitals in the indenture of assignment were false, inasmuch as there never was any indenture of mortgage, and that by fraud and imposition the plaintiff was induced to pay the said sum of £1200. To this replication the defendant demurred generally. (*a*) *390

Lord Mansfield: "The basis of the whole argument is fraud, and the question is, whether fraud is anywhere asserted in this replication. There may be many cases, where the assertion of a false fact, though unknown to be false to the party making the assertion, will be fraudulent; as in the case of Sir Crisp Gascoyne, who insured a life, and affirmed it was as good a life as any in England, not knowing whether it was or was not. There may be cases, too, which fraud will take out of the Statute of Limitations; but here, every thing alleged in the replication may be true, without any fraud on the part of the defendant. He is

(*a*) Bree *v.* Holbeck, 2 Doug. 654.

administrator with the will annexed, who finds the mortgage deed amongst the papers of his testator, without any arrears of interest, and parts with it *bonâ fide*, as a marketable commodity. If he had discovered the forgery, and had then got rid of the deed, as a true security, the case would have been very different; he did not covenant for the goodness of the title, but only that neither he nor the testator had encumbered the estate. It was incumbent on the plaintiff to look to the goodness of it." [1]

90. But if the purchaser be *evicted before any conveyance to him is executed*, having paid the purchase-money, he may recover it back in an action for *money had and received;* even though the covenants in the intended conveyance do not extend to the title, under which the estate was recovered. (*a*) [2]

91. A Court of Equity proceeds, in cases of this kind, upon the same principle as a Court of Law. For unless there is fraud, in concealing the defect in the title, the Court will not interfere. (*b*)

92. William Davy devised certain estates to his son William for life, remainder to his first and other sons in tail male, remainder to Sir Robert Ladbroke and Lyde Browne, their heirs and assigns, as tenants in common; and devised all the residue of his real estate to his brother William Pate, his heirs and assigns forever. Sir Robert Ladbroke died in the lifetime
391 * of the * testator. William Davy, the son, entered on the estates, upon the death of his father, and died without issue; having devised his estates to John Minnyer, Robert Pate, and Thomas Butler, in trust to sell. William Pate, the residuary devisee in the will of William Davy, the father, devised his reversion, expectant on the death of William Davy, junior, to Robert Pate in fee. Barwell Browne, the heir of Lyde Browne, and Robert Pate, (who conceived himself, as

(*a*) Cripps *v.* Reade, 6 Term R. 606. Johnson *v.* Johnson, 3 Bos. & Pul. 162.
(*b*) Coop. 309.

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[1] See Gouverneur *v.* Elmendorf, 5 Johns. Ch. 79; Abbot *v.* Allen, 2 Johns. Ch. 519, 523; Dorsey *v.* Jackman, 1 S. & R. 42.

[2] The rule is, that if *any* estate passed by the deed, the remedy of the purchaser is on the covenants alone; but if *nothing* passed by the deed, *assumpsit* will lie for the money paid. As to the rule or measure of damages in actions on the covenants for title in deeds of conveyance, see 2 Greenl. Evid. tit. DAMAGES, § 264.

residuary legatee in the will of William Davy, the father, to be entitled to the moiety devised to Sir Robert Ladbroke, and which became lapsed by his death in the lifetime of the testator,) sold the estate, for a valuable consideration, to Urmston, the plaintiff. The conveyance recited the will of William Davy the father, the death of Sir Robert Ladbroke in the lifetime of the testator, the death of William Davy the son, without issue; and that William Pate, the residuary devisee in the will of William Davy the father, had made his will, reciting that, in case of the death of William Davy the son, without issue, he would become entitled to the moiety of the estate devised to Sir Robert Ladbroke, and had, by his said will, given the reversion of his said moiety to his son (the defendant) in fee. And there was inserted in it a covenant, that, notwithstanding any act done by the defendant or his ancestors, or any person claiming under him or them, he was seised in fee of the premises. The purchaser afterwards, discovering that Robert Pate had no title to the moiety conveyed to him, it having descended to William Davy the son, as heir to his father, and belonging to his devisees, filed a bill in Chancery against Pate, praying that his purchase-money might be restored to him. The defendant demurred to the bill for want of equity; and the demurrer was allowed. (*a*)

93. Where any *fraud or concealment is practised by the vendor*, by which the estate is evicted, though by a person not claiming under the vendor, or any of those against whose acts the covenants for the title extend, the purchaser may bring an *action on the case*, in the nature of an action of deceit, against him; but a *bill in Chancery* will in most cases be found a more effectual remedy; as it will lead to a better discovery of the concealment and all the circumstances attending it, and may in some cases enable the Court to create a trust in favor of the *injured purchaser. And where the Court cannot satisfy itself of the fact, an issue will be directed to try whether the vendor did know of the encumbrance, at the time of the sale. (*b*) *392

94. With respect to encumbrances, if they are discovered after the execution of the conveyance, the purchaser has the same remedies as in cases of eviction.[1]

(*a*) 3 Ves. 285. (*b*) Harding *v.* Nelthrorpe, Nels. R. 118.

[1] So, if they were known before. See *supra*, § 59, note.

95. With respect to *defects in the title, which may be supplied by the vendor;* where any such are discovered, after the execution of the conveyance, the vendor may be compelled, in equity, to do whatever is necessary to supply such defect, by a bill for a specific performance of the covenant for further assurance. The transaction must, however, be free from all objection, otherwise the Court of Chancery will not compel the performance of a covenant for further assurance. (*a*)

96. It is laid down, by Lord Cowper, that a *covenant for further assurance* will not help the case *where the original conveyance itself is void*, so that, if a man covenanted to stand seised to the use of a mere stranger, and covenanted to make further assurance, the covenant depending on the nature of the conveyance, if that were void, the covenant which was only auxiliary, and went along with the estate, must be also void. (*b*)

97. The *usual covenants* in *assignments of leasehold estates*, are, that the *lease is valid in law, not forfeited, surrendered, or determined*, or *become void or voidable;* that the assignor has *good right to assign;* that the *rent has been paid*, and the *covenants performed*, up to the time of the assignment; *for quiet enjoyment* during the term; *free from encumbrances*, without any restriction; and for *further assurance.*

98. The *assignee* is also *bound to covenant with the assignor*, that *he will pay the rent, and perform the covenants in future;* and *indemnify the assignor* from the payment and performance thereof; and the latter covenant must be inserted, though the assignor, from his particular situation, is not bound to covenant for the title. [But *assignees of a bankrupt*, selling a lease which was vested in him, cannot require the purchaser to enter into such a covenant, for their indemnity, or for the indemnity of the bankrupt.] (*c*)

99. Where *the title deeds of an estate are retained by the vendor*, which frequently happens, either because they relate to a larger estate than that which is sold, or for any other
393* reason, **the purchaser is entitled to a covenant from the vendor for the production of them*, whenever it shall be necessary for the manifestation or support of the purchaser's

(*a*) Johnson *v.* Nott, 1 Vern. 271. (*b*) Prec. in Cha. 476.
(*c*) Staines *v.* Morris, 1 Ves. & Beam. 8. Wilkins *v.* Fry, 1 Mer. 244.

title.[1] And *this covenant* being real, *will run with the land* conveyed, and extends to all future purchasers of it. But if the deed containing such covenant, be not delivered to a future purchaser, he will then be entitled to a new covenant from the vendor, for the production of the title deeds. (*a*)

100. *Covenants for renewal* have been frequently inserted in leases; and are of *two kinds*, namely: covenants *for granting another lease* of the thing demised; and covenants for renewal, not only on the expiration or surrender of the original lease, but also on the expiration or surrender of all future leases made under such a covenant, which is usually called a covenant *for perpetual renewal.*

101. Bridges demised a mill, with the appurtenances, to Stapleton, for twenty-one years; and covenanted, that, if the lessee, his executors, administrators, or assigns, or any of them, should at any time thereafter, before the expiration of the term thereby demised, be minded to renew and take a further lease of the said premises, that then, upon application made, at any time before the last six months of the said term, the lessor, his heirs or assigns, should grant such further lease as should by the lessee, his executors, administrators, or assigns, be desired, without any fine to be demanded therefor, *and under the same rents and covenants only as in this lease.* Upon a bill filed in the Court of Exchequer, by an assignee of the lease, against the lessor, to compel him to grant a further lease, under the same rents and covenants as in the first lease, the Court decreed a new lease, which was settled by the Lord Chief Baron, and contained a covenant to grant a further lease at the end of the new term. (*b*)

The lessor appealed from this decree to the House of Lords, insisting that it was erroneous; for that the covenant for a further lease, after the expiration of the new lease, was in the nature of a perpetuity upon the appellant's estate; and might, according to the decree, be demanded from time to time continually; which

(*a*) Barclay *v.* Raine, 1 Sim. & Stu. 449. Fearne's Post. Works, 113.
(*b*) Bridges *v.* Hitchcock, 5 Bro. Parl. Ca. 6.

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[1] This covenant is seldom used in the United States; the grantee being entitled to give in evidence certified copies from the Registry, of all deeds on record, not running to himself; and the provision for the registry of conveyances being universal. See *ante*, tit. 2, ch. 1, § 39, note; *supra*, ch. 11, § 19, note; 1 Greenl. Evid. § 571, note.

was contrary to the intent and meaning of the covenant in the first lease, and of the parties thereto. To which it was an-
394 * swered by the respondent, that the covenant, entered *into by the appellant, to grant such further lease as should be demanded, under the same rent and covenants only as in the original lease, was the only foundation and encouragement which the parties had for expending so much money upon the demised premises as they had done, and accordingly, it was the true intent and meaning of the covenant, that the lessee should be at liberty to renew as often as he should require. The decree was affirmed.

102. Mr. Crew, the defendant's grandfather, made a lease to one Moor for three lives, with the following covenants: "And the said Thomas Moor, for himself, &c., covenants, grants, and agrees to and with the said John Crew, &c., that the said Thomas Moor, &c., shall, at the death of any of the lives before mentioned, which shall first happen, pay unto the said J. Crew, his heirs or assigns, within twelve months next ensuing such death, £68, in the name of a fine, to add one other life to the remaining two lives, and so to continue the renewing this lease or leases, paying as aforesaid to the said J. Crew, his heirs or assigns, £68, for every life so added or renewed from time to time. And the said J. Crew, for himself, his heirs, executors, and assigns, doth covenant and agree to and with the said T. Moor, his executors and assigns, that he the said J. Crew, his heirs, &c., shall and will, for the consideration of the said £68 as aforesaid, to be paid to the said J. Crew, his heirs, executors, or assigns, at Crew Hall, or at the place where the Hall now stands, seal and duly execute one or more lease or leases, under the same rents and covenants with these presents, and thereunto add such life or lives as shall be there and at such time nominated, to be added by the said Thomas Moor, his executors or assigns, within the term or space of twelve months next after the death of such life as aforesaid. (*a*)

There were two several renewals, by adding a life in 1686 and in 1709; and in 1740, the last life in the original lease dropped, one of the added lives continued still in being. The plaintiff, Furnival, who was entitled to the leases, under several assign-

(*a*) Furnival *v.* Crew, MSS. Rep. 3 Atk. 83.

ments, brought this bill against the defendant, Mr. Crew, for a renewal of the leases, with the same covenants for renewal as in the original leases. The question was, whether, under these covenants, Mr. Crew was now compellable to renew the lease, or whether the covenants should not be restrained to renewals only upon the original lives in the first lease.

*Lord Hardwicke.—" This bill is brought to have the *395 benefit of two covenants contained in two several leases, made by Mr. Crew, the defendant's grandfather; the first of which leases was made when Mr. Crew was tenant in fee of his estates, the other after a voluntary settlement, whereby Mr. Crew was become but tenant for life; but this last lease, being made for a valuable consideration, must prevail against the settlement. None of the original lives dropped during Mr. Crew's own life; but after his death there were renewals, with the same covenants added as in the original leases; and now that all the original *cestuis que vie* are dead, the question arises upon the construction of these two covenants, and whether the obligation on the part of the tenant to pay the fine, and on that of the landlord to grant a new lease, was intended to be perpetual. And I am of opinion, that the plaintiff is entitled to a renewal of the leases, with the same covenants for the renewal; and that these were intended for perpetual subsisting leases. It has been contended that the words in Moor's covenant, "so to continue renewing," &c., could mean only the adding a life upon the falling in of any of the original ones, but not upon an added life. But this construction satisfies not the intent, which was not the continuing of the estate, barely by giving a life, but by filling up the estate, for it is not only said "lease," but "leases;" and the word *or*, is here to be taken for *and*, to satisfy the intent, which was to take in the new leases, the last as well as the original one; and the covenant on the part of the lessor, to grant under the same rent and covenants, takes in the covenant for renewal. The words, "*next after the death*," are not to be confined to the lives in the original lease, but extend to any, whether in the original, or added upon renewal; and this appears from the making the fine payable at Crew Hall, or the place where the Hall now stands; which words, though they may be said not to be of much weight, yet are an evidence of the intent, that the lease might continue so

long as time endured; since neither lessor nor lessee could have it in view that Crew Hall, the family seat, might be demolished in three lives. It has been objected that no breach could be assigned against the heir or executor of the lessor, in an action of covenant; but I think there might, either by the lessor or lessee; and if so, a court of equity may properly relieve, provided there be no objection against granting such relief; either from the nature of the covenant itself, or the condition of
396 * the * person seeking the benefit of it. I. Because the covenant being for making an estate in land, a court of equity can give the thing itself, which is the highest and most adequate remedy; damages only being recoverable at law. II. Because, at law, the remedy could only be against the representative of the lessor, out of the lessor's assets, which would be recovering out of another's pocket; whereas this is against the land itself. It was next objected, that covenants for perpetual renewals were not to be favored, being in effect an engaging the inheritance. But this, being a contract for a valuable consideration, must be performed; and as Mr. Crew, the grandfather, might have sold the fee, so might he lay what charges he pleased upon it, in the hands of those who came after him. In England, indeed, these covenants are rare; but in Ireland they are very frequent. Then it was said that the consideration is not adequate; but I cannot from the evidence judge of that, either one way or the other. And this is a much more favorable case than that of Bridges *v.* Hitchcock, (*a*) or Hyde *v.* Skinner, since in neither of those was any fine to be paid; whereas, in the present, a fine is payable upon every renewal; and so a benefit stipulated for the successors. Another objection was made against renewing, that the successors might not all of them have such an estate as would enable them to renew. But I think the renewal may and must be made according to the nature of the defendant, Mr. Crew's estate; and if he be but tenant for life, though he cannot covenant for his heirs, yet he may for himself and all claiming under him. The case of Doctors' Commons *v.* Dean and Chapter of St. Paul's, (*b*) heard by Lord King, assisted by Lord Raymond and J. Price, and which afterwards went up to the House of Lords, was decreed upon a particular reason. There the

(*a*) *Supra*, s. 101.

(*b*) 1 Bro. Parl. Ca. 240.

Lords confined it to one renewal, because the contrary construction would have been going against the restraining statutes, whereby ecclesiastical persons can grant but for a particular term. That of Hyde *v.* Skinner is of no authority; it was a lease without any fine paid, or agreed to be paid; and by the report seems more like an award or compromise than a decree. But that of Bridges *v.* Hitchcock is an authority in point, only not so strong as the present. There was a lease for twenty-one years, without any fine or covenant on the part of the lessee; as there is here only a covenant on the lessor's part, to grant a new lease, *with the* * *same covenants;* and there, upon the * 397 words, *same covenants*, the Court decreed the new lease to have the like covenant for renewal; and though it was said there had been great improvements, yet two terms might well be thought a reasonable satisfaction. I therefore think the plaintiff entitled to a renewal, under the same rents and covenants; but it must be such as Mr. Crew's estate will enable him to make."

103. A case was sent out of Chancery by Lord Bathurst, for the opinion of the Court of King's Bench, stating as follows:— "That Robert Booth, by indenture, demised certain premises to Otho Cooke, for the lives of the lessee and two other persons; and covenanted that if the said Otho Cooke, his heirs and assigns, should be minded, at the decease of the three persons named in the lease, or any of them, to surrender his indenture, and take a new lease of the said premises, and thereby add one new life to the two then in being, in lieu of the life so dying; that then the said R. Booth, his heirs, &c., upon request, on such surrender of the lease then in being, and upon payment of a broad piece of gold to the said R. B. his heirs, &c., for every life so to be added, in lieu of the life of every of them so dying, and at the proper cost of the said Otho Cooke, without demanding any further fine for the same, should grant and execute unto the said Otho Cooke, his heirs, &c., a new lease for the lives of the two persons named in the former lease as should be then living, and of such other person as the said O. Cooke, his heirs or assigns, should nominate and appoint, in lieu of the person named in the preceding lease, as the same should respectively happen to die, under the before-mentioned annual rent, and the same covenants therein contained. The lease was dated in

1740, and there had been successive renewals, containing the same clause of renewal from the time of a former lease granted by the ancestor of Robert Booth, in 1688, down to the date of the lease in question. In 1773, a new lease, (one of the lives having dropped,) was tendered to the landlord in the same terms as the former leases, which he refused to execute, because it contained a covenant for renewal. (*a*)

Lord Mansfield said, the question in all these cases was, whether *under the same rents and covenants* should be construed inclusive or exclusive of the clause of renewal; and arguments drawn from every part of the agreement were material. 398 * Here * the parties themselves had put the construction upon it, for there had been frequent renewals, and in all of them the covenant for renewal had been uniformly repeated. How then should the Court say the contrary?

The Court certified their opinion, that a like covenant for renewal ought to be inserted in the new lease.

104. The principle upon which the Court of King's Bench founded their opinion in this case, has been since frequently denied. Lord Alvanley, when Master of the Rolls, has said,—"I strongly protest against the argument used by the learned Judges in Cooke *v.* Booth, as to construing a legal instrument by the equivocal acts of the parties, and their understanding upon it, which I will never allow to affect my mind. That case was sent to law by Lord Bathurst; the learned Judges thought fit to return an answer to the Chancellor, that the legal effect was a perpetual renewal, upon the ground that by voluntary acts, which the parties might or might not have done, the parties themselves had put a construction upon it. Lord Mansfield made it his chief ground; but that ground was disapproved by Lord Thurlow, and is, I think, totally unfounded. I never will construe a covenant so. I never was more amazed, and Mr. Justice Wilson, who argued it with me, was astonished at it. When it came back, Lord Bathurst, not having retained the great seal long enough for it to come before him again, it came before Lord Thurlow, who said, that sitting as Chancellor, when he asked the opinion of a court of law, whatever his own opinion might be, he was bound by that of the court of law; therefore he

(*a*) Cooke *v.* Booth, Cowp. 819.

decreed a renewal; but said he should be very glad if Mr. Booth would carry it to a superior tribunal. We had a consultation, and I wrote to Mr. Booth upon it; but he, being only tenant for life, refused to appeal." (*a*) [1]

105. An opinion appears to have formerly prevailed, founded on the authority of the case of Bridges *v.* Hitchcock, that a covenant to renew a lease, *under the same rent and covenants* as those contained in the original lease, created a right to a perpetual renewal, the covenant for renewal being included. But this doctrine has been long since exploded; as appears from the following cases.

106. One Skinner, possessed of a long term for years of a house, leased it for five years, and covenanted for himself and his *executors to renew this lease at the same rent, *399 and on the same covenants, upon the request of the lessee within the term. Lord Macclesfield decreed a new lease for twenty-one years, but said, that though the lease was to be made on the same covenants, yet that should not take in a covenant for the renewing the new lease; forasmuch as then the lease would never be at an end. (*b*)

107. In a lease, made by the defendants to plaintiff's testator, of a house for twenty-one years, there was a covenant that the defendants, at the end of the first seven years, would, upon the surrender of that lease, make a new lease for the term of twenty-one years, at the same rent and with the same covenants as were reserved and contained in the old lease. The bill was for a specific performance of this covenant; and the question was, if the covenant for renewal should be inserted in the new lease. (*c*)

Sir Joseph Jekyll, M. R., was of opinion it should not, there being no words to show that it was the intention of the parties that the lease should be renewed *toties quoties;* for that in effect would be to give the plaintiff a fee; and therefore decreed the defendants to make a new lease, but without the covenant for renewal.

(*a*) 3 Ves. 298. *Vide* 6 Ves. 238. 9 Ves. 333. Iggulden *v.* May, *infra*, s. 111. (Cortelyou *v.* Van Brundt, 2 Johns. 357.

(*b*) Hyde *v.* Skinner, 2 P. Williams, 196.

(*c*) Davis *v.* Taylors' Comp. Harg. Jur. Argum. Vol. 2, 427.

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[1] See the exposition of this case and its principle, *supra*, ch. 20, § 23, note.

108. Lord Molyneux and his wife demised a farm for a term of ninety-nine years, if three persons or any of them should so long live, rendering rent; and Lord M. covenanted, for himself and his wife, their heirs and assigns, that he and they would, upon the death of any of the lives named in the lease, add a new third life, upon payment of £200, within six months; or upon the death of two of them, add two new lives, upon payment of £500; or upon the death of all them, would, upon payment of £1150, make a new lease or grant for any three new lives, to be nominated and appointed by the lessee, his executors, administrators, or assigns, for the like term as was thereby demised; at and under the like rent, covenants, and agreements therein contained. Upon the death of the survivor of the lives mentioned in the original lease, the lessee applied for a renewal, and tendered the engrossment of a lease for ninety-nine years, renewable upon the dropping of three new lives, at the old rent; with a covenant for renewal of that lease, to the same effect as had been contained in the original lease; tendering at the same time the fine of £1150. The defendants declined executing
400* the lease, with *such covenant; whereupon the lessee filed his bill to compel the defendants to execute such new lease, with such covenant of renewal. (*a*)

Lord Camden was of opinion, that the defendants were not under any obligation to grant any further lease, than for three new lives only; and that the plaintiff was not entitled to have any covenant inserted for any further renewal; the words of the old covenant not obliging the lessors to grant a new lease, but upon the death of some one of the three persons named in that lease; and they being all dead, the plaintiff could claim no further renewal; and therefore decreed a new lease for ninety-nine years, renewable on the death of three persons named in the prepared lease, but without any covenant for any further renewal.

109. A lease was made for twenty-one years, in which there was a covenant on the part of the lessor, that he, his executors, &c., should, at the end of the said term of twenty-one years, seal and execute a new lease of the said premises, for the further term of seven years; subject to the same rents, and pursuant to the same exceptions, covenants, reservations, conditions, and

(*a*) Russell *v.* Darwin, 2 Bro. Rep. 639, note.

agreements, in all respects, as were in and by the said indenture of lease mentioned and expressed, in case the lessee, his executors, &c., should desire the same. (*a*)

Lord Thurlow said, he had not an idea that the intention of the lessor was, to renew the covenant of renewal; or that it could be so construed in a court of equity.

110. Lord Foley made a lease for three lives, with a covenant for renewal under the like rent, covenants, provisoes, and conditions as were contained in the original lease. (*b*)

Sir W. Grant, M. R., said he agreed with the late Master of the Rolls, (Sir R. P. Arden,) who says,—"I collect therefore from these cases this, that the Courts, in England at least, lean against construing a covenant to be for a perpetual renewal, unless it is perfectly clear that the covenant does mean it. Furnival *v.* Crewe, which is relied on in Cooke *v.* Booth, had clear words for a perpetual renewal, which made it impossible to construe it otherwise." And said,—there being no clear words in this case, nor any words relative to perpetual renewal; the question is, whether the proviso, that the renewal shall be under the same rents, covenants, and conditions as the first lease, shall, *in the *401 absence of more positive stipulations, amount to a perpetual renewal. Upon Tritton *v.* Foote, and Russell *v.* Darwin, I am bound to hold, that a covenant for renewal under the same covenants, does not include the covenant to renew; but that it means only a second lease, not a perpetuity of leases. (*c*)

111. J. Dilnot, by indenture of lease dated 29th September, 1783, demised certain premises in Deal to three persons, for twenty-one years, at the rent of 6*s.* 9*d.* And the lessor covenanted that he, his heirs, and assigns, at the end of eighteen years of the said term of twenty-one years, or before, upon request, would make to the lessees a new lease for the like fine, at the like yearly rent of 6*s.* 9*d.*, payable as aforesaid, "with all covenants, grants, and articles," as in the said lease were contained, and this was the only covenant in the lease. (*d*)

After the expiration of eighteen years from the execution of the lease, Iggulden, who was assignee of the lease, applied to

(*a*) Tritton *v.* Foote, 2 Bro. C. C. 636.
(*b*) Moore *v.* Foley, 6 Ves. 232. 2 Cox's Rep. 174. (*c*) 3 Ves. 295. 11 Price, 13.
(*d*) Iggulden *v.* May, 9 Ves. 325. Hargrave's Juris. Exer. Vol. 3, 222.

J. May, to whom Dilnot had sold the estate, for a new lease, upon the terms contained in the clause for renewal. May, objecting to grant a lease containing a similar covenant for renewal, a bill was filed. The question was, whether the plaintiff was entitled to a lease, containing that covenant. The answer admitted that for a great number of years, and particularly from 1747, leases of these premises had been granted to the plaintiff's father, and the several persons under whom he claimed, similar to the lease of 1783.

Lord Eldon said, he was clearly of opinion, the construction of this covenant must be the same in equity as at law; that the acts of the parties had nothing to do with the construction; that this lease must be construed precisely as the first lease. Also he was of the same opinion as Lord Alvanley and Sir W. Grant, that the general doctrine was, that where a lease was made, without more than the general words, they would not impose an obligation to insert a covenant for renewal. The bill was retained for twelve months, with liberty to bring an action. (*a*)

112. An action of covenant was accordingly brought in the Court of King's Bench, and Lord Ellenborough delivered the opinion of the Court, that the plaintiff was not entitled to require the execution of a lease to him, containing the covenant of renewal. (*b*)

402* *113. The right of renewal may be forfeited by the laches of the tenant, in not applying for a renewal within the time mentioned in the lease.

114. The Marquis of Carnarvon demised certain lands to Thomas Landon, his executors, &c., for ninety-nine years, if three lives therein named should so long live; with a covenant to renew, and a proviso that if the lessee, his executors, &c., refused or neglected to renew the said lease, or to make application therein after the death of the first or any of the lives, for two years, then the lease should be void. The lessee neglected to renew on the death of the two first persons, whose names were in the lease: but within a year after the death of the last life, he applied for a renewal. (*c*)

(*a*) 1 M'Clel. 464.

(*b*) 7 East, 237. Moore *v.* Foley, 6 Ves. 232. City of London *v.* Mitford, 14 Ves. 53.

(*c*) Baynham *v.* Guy's Hospital, 3 Ves. 295. Redshaw *v.* Governors of Bedford Level, 1 Eden, 346.

The Master of the Rolls, (Sir R. P. Arden,) was clearly of opinion, that the lessee had not entitled himself to the benefit of the covenant; therefore the right of renewal was forfeited.

115. [In Eaton *v.* Lyon, the covenant to renew was, that the said D. Orred and S. Orred, and the survivor, his heirs, executors, administrators, or assigns, would, within six months after the decease of any of the three lives before mentioned, give notice to the said G. Hockenhull, his heirs and assigns, of the decease of such person or persons, and would, within the further space of six months, surrender the lease, and accept of a new lease, and therein add one or two life or lives to those then in being, as the case should require, upon certain payments therein mentioned. And G. Hockenhull covenanted with D. and S. Orred, that the said G. Hockenhull, his heirs or assigns, would, at the decease of any of the life or lives aforesaid, at the request of the said D. Orred and S. Orred, or of the survivor, his heirs, &c., grant a new lease, and add one or more life or lives, in the room of the life or lives so dying; such new lease to contain all the covenants comprised in the then lease. No notice was given within six months after the death of the first life. Upon an application for a renewed lease, after the death of the second life, the renewal was refused, on the ground that the right to renewal was forfeited; and upon a bill, filed for specific performance of the covenant to renew, the question turned upon the construction of the covenant: and Lord Alvanley, M. R., decided *the true construction was, that notice was to be *403 given within six months after the death of the first life, and he accordingly dismissed the bill. (*a*)

116. A similar decision to the last was made in the subsequent case of Maxwell *v.* Ward.] (*b*)

(*a*) 3 Ves. 690.

(*b*) 1 M'Clel. 458.

CHAP. XXVII.

HOW DEEDS MAY BE AVOIDED.

SECT. 1. *Disclaimer.*
6. *Disagreement.*
10. *Duress.*
12. *Erasure or Interlineation.*
16. [*A Blank filled up after Execution will not, under circumstances, invalidate the Deed.*]
17. *Breaking off the Seal.*
19. *Cancelling.*
SECT. 23. *Where it is Usurious.*
25. *When obtained by Fraud.*
37. *Or made in derogation of the Rights of Marriage.*
50. *Or for an immoral Consideration.*
59. *All Deeds void as to Crown Debts.*
65. *The Crown entitled to a Term to attend.*

SECTION 1. Deeds *may be avoided* in several ways, and for several reasons. Thus in a case of a *deed poll*, the *grantee may disclaim the estate* intended to be given, in which case no estate will vest in him. But in the case of an *indenture*, if the grantee *executes* it, he *thereby accepts the estate* limited to him, and cannot afterwards disclaim. (*a*)

2. It has been stated that a deed transfers the estate, without the assent of the grantee,[1] so that where he does not execute it, the estate becomes notwithstanding vested in him; but he may disclaim it, in which case it becomes devested. Thus it is said in Brooke's Ab., that if a lease be made to A for life, remainder to B, and after A dies, the law adjudges the frank tenement in B till he disagrees or disclaims; and by the waiving thereof, it vests in the donor or his heir. (*b*)

3. It was formerly held, that a disclaimer of a freehold estate must be in a Court of Record, because a freehold should not be devested by bare words *in pais*. Thus, where a lease for life

(*a*) Bro. Ab. Disclaimer, 54. Joint Ten. 570. Shep. Touch. 68, 70.
(*b*) *Ante*, c. 1, § 25, 26. Bro. Abr. tit. Done, 7.

[1] The broad proposition that the assent of the grantee is not necessary to the conveyance, is controverted; *supra*, ch. 1, § 25, 26, notes. And see *supra*, ch. 2, § 64, note.

was made to B, remainder to C and D in tail; it was adjudged, that C and D could not disagree to the remainder, without matter of record, for they were tenants in common; but if the *remainder had been limited to them in fee, so as *405 they took jointly, it had been otherwise; for then by the disagreement of the one, the other should take the whole lands. (*a*)

4. It has, however, been settled for some time, that a person *may disclaim a freehold estate by deed;* and this doctrine has been confirmed in the following case. (*b*)

5. I. Astley, by his will, devised certain freehold estates to Townson and Lock in fee, upon certain trusts. Lock, by deed, absolutely disclaimed and renounced all and singular the estate and estates, trusts, powers, and authorities by the said will limited, created, or declared. And the question was, whether the estate was devested out of Lock by this disclaimer, and solely vested in Townson, the other devisee. (*c*)

Lord C. J. Abbot said, the law was not so absurd as to force a man to take an estate against his will. *Primâ facie*, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is given. Of that, however, he is the best judge; and if it turn out that the party, to whom the gift is made, does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift. The question here is, in what mode that refusal is to be made. In this case, the renunciation has been by deed, under the hand and seal of the party. It has been argued, however, that nothing short of renunciation or disclaimer in a court of record will avoid the devise; and if there had been any distinct authority to that effect, we should have been bound to give due weight to such authority. It does not seem to me, however, that the cases have gone the length of deciding that the renunciation must take place in a court of record. The learned counsel has not been able to suggest any mode by which the devisee could have disclaimed in a court of record; and certainly it could not be done, unless some other person thought fit to cite him there to receive his disclaimer; and if the estate were *dam-*

(*a*) 3 Rep. 26 a. Anon. 4 Leon. 207. (*b*) Hawkins *v.* Kemp, 3 East, 410.
(*c*) Townson *v.* Tickell, 3 B. & Ald. 31. Nicloson *v.* Wordsworth, 2 Swanst. 365. The King *v.* Wilson, 10 B. &. Cres. 80.

riosa hæreditas, that would not be likely to happen. It might, therefore, in some instances, be a matter of difficulty to make a disclaimer in a court of record. The case of Thompson *v.* Leach, (*a*) seems to me to be a strong authority to show that it is not necessary. Three of the Judges there held, that an estate did not pass by a surrender to the surrenderee, till he expressly accepted it. Mr. Justice Ventris differed, and held that
406* it passed * immediately, liable to be devested by the dissent of the surrenderee. His judgment is, however, wholly founded on this, that a party to whom an estate is given, must be taken to give an implied assent to that which is for his benefit, till the contrary appears. That learned Judge expressly states that a man cannot have an estate put into him in spite of his teeth. I concur in that opinion, and think that the renunciation here having been by deed, under the hand and seal of the party, must have the effect of making the devise, with respect to him, null and void. The other Judges concurred, and judgment was given accordingly. It should be observed, that this was the case of a will, but the reasoning of the Judges shows, that if it had been the case of a deed, the decision would have been the same.

6. There are several cases in which a deed may be avoided *by disagreement.* Thus, although *infants* may purchase real property, because it may be for their benefit, yet they may, upon their attaining their full age, either agree or disagree to it; and so may their heirs after them, if they did not agree to it after their full age. (*b*)

7. A *married woman* is capable of purchasing, for such an act does not make the property of her husband liable to any disadvantage; and the husband is supposed to assent, as being for his advantage. But *the husband may disagree*, and it shall avoid the purchase.[1] If he neither agrees nor disagrees, the purchase is good, for his conduct will be esteemed a tacit consent, since it is to turn to his advantage; but in this case though the husband should agree to the purchase, yet after his death the wife may

(*a*) 2 Vent. 201. (*b*) 1 Inst. 2 b.

[1] This doctrine of the common law may perhaps be considered as qualified, in some of the United States, by statutes recently enacted, enabling *femes covert* to acquire and hold property as if they were sole.

disagree to and waive it; for having no will of her own at the time of the purchase, she is not indispensably bound by the contract; therefore if she does not when unmarried, by some act, express her agreement to such purchase, her heirs shall have the privilege of disagreeing to it. (*a*)

8. Lord Coke says, *a man of nonsane memory* may, without the consent of any other person, purchase lands, which he cannot waive; but, if he die in his madness, or after become sane, without agreement thereto, his heir may waive and disagree to the estate, without any cause shown; and so of an idiot. But if the man of nonsane memory recover, and agree to the purchase, it then becomes unavoidable. (*b*)

9. Any person may disagree to *a term for years.* Thus, *where a person assigned the residue of a term for years *407 in a rectory to two persons, and one of them disagreed to it, Lord Hale said that the disagreement of one of the assignees made the estate wholly the other's. (*c*) †

10. Deeds, *executed by persons under duress* of imprisonment, or duress *per minas*, are void. Thus, if a person be put under any illegal restraint or confinement, until he executes a deed, he may allege this duress, and thereby avoid the deed. But if a person be *lawfully* imprisoned, and, either to procure his discharge, or on any other fair account, executes a deed, he will not be allowed to avoid it. (*d*)

11. If a man, through a reasonable and well-founded fear of death, or mayhem, or loss of limb, is forced to execute a deed, he may afterwards avoid it. But Lord Coke says, it is otherwise where a deed is executed for fear of battery, which may be very light; or burning his houses, or taking away or destroying his goods, or the like; for there he may have satisfaction, by recovery of damages. (*e*) [1]

(*a*) 1 Inst. 3 a. 1 Bac. Ab. 498. (*b*) 1 Inst. 2 b.
(*c*) Smith *v.* Wheeler, 1 Vent. 128.
(*d*) 2 Inst. 482. Strathmore *v.* Bowes, *infra*, § 46. (*e*) 2 Inst. 482.

[† It has been stated that a releasee to uses cannot disagree to the release. *Ante*, c. 12. *Note to former edition.*]

[1] But see 2 Greenl. on Evid. tit. DURESS, § 301. [Duress *per minas*, may avoid a contract, though of other things than death, mayhem, or loss of limb, as threats of an unlawful arrest. Robinson *v.* Gould, S. J. C. Mass. Suffolk, March Term, 1853. 16 Law Rep. 347.]

12. A deed may be avoided on account of an *erasure or interlineation.*[1] And in Pigot's case, it was resolved, that when a deed is altered, in a part material, by the plaintiff himself, or by a stranger, without the privity of the obligee, be it by interlineation, addition, razing, or by drawing a pen through the middle of any material word, the deed becomes void. But in a modern case, the Court of King's Bench appears to have held that an alteration by a stranger, or a mere spoliator, would not invalidate a deed. (*a*) †

13. If the obliteration be made by the party who owns the deed, although it be in a part not material, or that it is to the advantage of the other party, and to his own disadvantage, yet the deed will be rendered void. But if the alteration be made by a stranger, in an immaterial part, without the privity or consent of the owner, it will not make it invalid. (*b*)

14. An interlineation, if nothing appear to the contrary,
408* will *be *presumed* to have been *made at the time when the deed was executed*, and not after; and it has also been held, that an interlineation, by which a power of sale was enlarged, should be presumed to have been made at the time of the execution of the deed, and not after; if nothing appeared to the contrary. (*c*)

15. The *modern practice* is, when any alteration, interlineation, or erasure, is made in a deed, before it is executed, to take *notice of it in the attestation.* ‡

16. [In a deed, conveying real estates to trustees to sell for the benefit of creditors, the particulars of whose demands were stated in the deed, there was *left a blank for one of the principal*

(*a*) 11 Rep. 26. Henfree *v.* Bromley, 6 East, 309. 9 East, 351.

(*b*) 7 Rep. 27 a. 5 Taunt. 710.

(*c*) Trowel *v.* Castle, 1 Keb. 22. Fitgerald *v.* Fauconberge, Fitzgib. 204. (1 Greenl. Evid. § 564.)

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[1] As to the nature of that which constitutes an "*alteration*" in a deed, and the effect thereof, see 1 Greenl. Evid. § 564–568, and the cases there cited.

[† It has also been determined, that any alteration made after the execution of a deed, by some of the parties, leaves the deed valid as to them, provided the alteration has not affected the situation in which they stood. Doe *v.* Bingham, 4 B. & A. 672. *Note to former edition.*]

[‡ The provisions of a deed may be varied by indorsement before the deed is executed. Eales *v.* Conn, 4 Sim. 65.]

debts; the exact amount of the debt being *subsequently* ascertained, was *inserted in the blank*, the day *after the execution*, in the *presence of the grantor and with his assent.* He afterwards recognized the deed as valid in various ways, particularly by being present when it was executed by his wife, and by joining her in a fine to enure to the uses of the deed: held, that the deed was valid, notwithstanding the filling up of the blank after execution.] (*a*) [1]

17. It was formerly held, that if the *seal of a deed was broken off*, or so defaced that no sign or print of it could be seen; unless the person who was bound by the deed did it, the deed became void. But this was soon altered, and it was settled, that where there was ground to presume that the seal had been torn off by accident, or destroyed by time, the deed should, notwithstanding, be deemed valid. (*b*)

18. The seals of a deed to lead the uses of a recovery were broken off; but it being proved that seals were once annexed to it, and that they were torn off by a little boy; and the parts torn off being compared with the deed, and agreeing, it was held to be valid. (*c*)

19. If a deed be delivered up to be cancelled, to the party who is bound by it, and it is accordingly *cancelled*, by tearing off the seals, or otherwise defacing it; or if the person who has the deed cancels it, by agreement with the other party, it becomes void. But *where an estate has actually passed by* a deed, *the cancelling of it afterwards will not devest *409 any estates out of the persons in whom they were vested by such deed. (*d*) [2]

20. A father, having quarrelled with his eldest son, made a settlement on his wife of £100 a year, in augmentation of her

(*a*) Hudson *v.* Revett, 5 Bing. 368.

(*b*) 2 Rep. 22 b. Cro. Eliz. 408. Nichols *v.* Haywood, 1 Dyer, 59 a. Seaton *v.* Henson, 2 Show. R. 29. (1 Greenl. Evid. § 566.)

(*c*) Argoll *v.* Cheney, Palm. 402. (*d*) Shep. Touch. 70.

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[1] See *supra*, ch. 2, § 46, note, where this point is discussed.

[2] [Schutt *v.* Large, 6 Barb. Sup. Ct. 373; Jordan *v.* Pollock, 15 Geo. 145; Lisloff *v.* Hart, 25 Miss. 245; Baldwin *v.* Bank of Massillon, 1 Ohio State R. 141; King *v.* Crocheron, 14 Ala. 822; Connelly *v.* Doe, 8 Blackf. 320.] An exception to this rule, admitted in *Massachusetts*, *New Hampshire*, and *Maine*, has been stated, *supra*, ch. 1, § 15, note.

jointure. Afterwards, being reconciled to his son, he cancelled the deed, and so it was found at his death. On a trial at law, the deed, being proved to have been executed, was adjudged good, though cancelled. (*a*)

21. In setting forth a conveyance, it was stated, that a deed of release was cancelled, by the releasor's seal being torn off, and destroyed; and that part of the deed was lost, with a *profert in curia* of the residue. It was held to be good pleading; and Lord Ch. J. Eyre said,—"I hold it clearly that the cancelling a deed will not devest property, which has once vested, by transmutation of possession. And I would go further, and say, that the law is the same with respect to things that lie in grant. In pleading a grant, the allegation is, that the party at such a time did grant. But if by accident the deed is lost, there are authorities enough to show, that other proof may be admitted. The question in that case is, whether the party did grant. To prove this, the best evidence must be produced, which is the deed; but if that be destroyed, other evidence may be received, to show that the thing was granted. For, God forbid that a man should lose his estate, by losing his title deeds." (*b*)

22. Where a tenant for life, with a power of leasing, in consideration of the surrender of a prior term, granted a new lease, which was void; it was held that the prior term, though the indenture of lease was in fact cancelled, and delivered up, when the new lease was granted, might be set up by the tenant, in bar to an ejectment brought by the remainder-man, after the death of the tenant for life. (*c*)

23. By the several *statutes against usury*, particularly that of 12 Ann. st. 2, c. 16, it is enacted, that no person shall take, directly or indirectly, for the loan of any moneys, wares, merchandises, or other commodities whatsoever, above the value of five pounds for the forbearance of one hundred pounds by the year; and so after that rate, for a greater or lesser sum; or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever, for payment of any principal money to
410* be lent, *whereupon or whereby there shall be reserved or taken above the rate of five pounds in the hundred, as

(*a*) Hudson's case, Prec. in Cha. 235.
(*b*) Bolton *v.* Carlisle, 2 H. Black. 259. (1 Greenl. Evid. § 566.)
(*c*) Roe *v.* Archo. of York 6 East, 86.

aforesaid, shall be utterly void; and the person taking above five pounds for the forbearance of a hundred pounds for a year, shall forfeit treble the value of the moneys, &c., so lent.[1]

24. These statutes do not extend to *post obit* bonds, or to the purchase of annuities for lives; where the purchaser's principal is *bonâ fide*, and not colorably, put in jeopardy. For in that case, no inequality of price will make it an usurious bargain. (*a*)†

25. Deeds, *obtained by fraud and covin*, may be avoided in the courts of common law. Thus, where an illiterate person was induced to execute a deed, by its being *read over to him falsely*, it was adjudged void. (*b*) [2]

(*a*) Chesterfield *v.* Janssen, 2 Ves. 142. Murray *v.* Harding, 2 Black. R. 859.
(*b*) Thoroughgood's case, 2 Rep. 9.

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[1] In the United States, the general rate of interest is six per cent., though in some States it is higher. In a majority of the States, usury, though visited with other penal consequences, does not render the security totally void. See *Maine*, Rev. St. 1840, ch. 69; *Massachusetts*, Rev. St. 1836, ch. 35; *New Hampshire*, Rev. St. 1842, ch. 190; *Vermont*, Rev. St. 1839, ch. 72; *R. Island*, Rev. St. 1844, p. 286; *Pennsylvania*, Dunlop's Dig. p. 76; *Delaware*, Rev. St. 1829, p. 314; *Georgia*, Rev. St. 1845, ch. 16, § 56; *Ohio*, Rev. St. 1841, ch. 62; *Indiana*, Rev. St. 1843, ch. 31, § 29; *Tennessee*, Rev. St. 1836, p. 407, § 4; *Kentucky*, Rev. St. 1834, Vol. II., p. 857, 858; *Mississippi*, Rev. St. 1840, ch. 35, § 14; *Missouri*, Rev. St. 1845, ch. 88; *Illinois*, Rev. St. 1839, p. 343; *Louisiana*, Civ. Code, art. 2895.

In the other States, the statutes against usury, conform substantially with the statute of 12 Ann. st. 2, c. 16, as quoted in the text.

† By the statute 14 Geo. 3, c. 79, all mortgages of estates or other property in Ireland, or in the colonies or plantations in the West Indies, bearing the interest allowed in those countries, shall be legal, though executed in Great Britain; unless the money lent shall be known at the time to exceed the value of the thing or pledge. In which case also, to prevent usurious contracts at home, under the color of such foreign securities, the borrower shall forfeit treble the sum borrowed. Tit. 15, c. 4, s. 59.

It was held that this statute only extends to bonds given as collateral securities, for the payment of the principal and interest lent on such mortgages; and not to any other bonds, or personal securities. [But the above act is explained by the 3 Geo. 4, c. 47, which repeals the prior explanatory statute, 1 & 2 Geo. 4, c. 51. The stat. of the 3 Geo. 4, c. 47, renders valid all such collateral, as well as principal securities; and whether executed at the same time as the principal securities, or subsequently. Dewar *v.* Span, 3 Term R. 425.]

[[2] *It seems*, that if A intending to deceive B, for A's advantage and B's disadvantage, induces B to make a deed by representing a fact to be true which is not true, but about which A in reality knows nothing, it will amount to a fraud and avoid the deed. Evans *v.* Edmonds, 24 Eng. Law & Eq. 227. A deed vitiated by fraud is not void, but voidable only. No one can take advantage of the fraud but the party defrauded, or those who have his estate. Gage *v.* Gage, 9 Foster, (N. H.) 533. A deed void as fraudulent, as to part, is void as to the whole. Goodhue *v.* Berrien, 2 Sandf. Ch. R. 630.]

26. No person, however, will be allowed to allege *his own fraud*, to avoid his own deed; and therefore where a deed of conveyance of an estate, from one brother to another, was executed to give the latter a colorable qualification to kill game, it was held by the Court of K. B. that, as against the parties to the deed, it was valid. (*a*)

27. Notwithstanding the jurisdiction of the courts of common law, in matters of this kind, yet the practice has long been to seek redress in equity, against deeds that are obtained fraudulently; because a court of equity will allow of a number
411* of *averments, and will admit of several kinds of evidence, not received in courts of law. But the cases, which have been decided on this head, are so various, and each of them depends so much on its own particular circumstances, that only a few general principles can be deduced from them. (*b*)

28. It may, however, be laid down, that *ignorance and misapprehension* of the party is a ground on which *courts of equity* have sometimes avoided a deed; but equity will *not* interpose, if the fact was *from its nature doubtful*, or *equally known to both parties* at the time of the agreement. It is not, however, every surprise that will avoid a deed duly made; nor is it fitting, as it would occasion great uncertainty; for it would be impossible to fix what was meant by surprise; as a man may be said to be surprised into every action which is not done with as much discretion as it ought to be; therefore the surprise here meant must be accompanied with fraud and circumvention. There must either be *suppressio veri*, or *suggestio falsi;* and *it must be fully proved;* for fraud is a thing odious in law, and never to be presumed. (*c*)

29. *Inadequacy of consideration* is a ground upon which a court of equity has *sometimes avoided a deed;* provided it be such as to show, that a person *did not understand the bargain* he made, or was *so oppressed* that he was glad to make it, knowing its inadequacy; for these circumstances will show a command over him, which may amount to a *fraud.* But there is no

(*a*) Doe *v.* Roberts, 2 Barn. & Ald. 367. Groves *v.* Groves, 3 Yo. & Jer. 163. [Walton *v.* Bonham, 24 Ala. 513; McClenny *v.* Floyd, 10 Texas, 159.]

(*b*) 1 Burr. R. 396. Stat. 3 & 4 Will. 4, c. 27, s. 24. Bro. Parl. Ca. tit. Fraud.

(*c*) Treat. of Eq. B. 1, c. 2, ss. 7, 8. Whitfield *v.* Taylor, tit. 7, c. 2, s. 5. Broderick *v.* Broderick, 1 P. Wms. 239. (1 Story, Eq. Jur. § 191, 195–197, 204, 217, 437.)

case in which it has been held, that mere inadequacy of price is a ground for a court of equity to annul an agreement, though executory, if the same appear to have been fairly entered into, and understood by the parties, and capable of being specifically performed. Still less does it seem to have been considered as a ground for rescinding an agreement actually executed. (*a*)

30. Bonds for money, or beneficial leases, taken as *rewards for procuring marriages*, will be set aside in equity; because such transactions tend to induce executors, trustees, guardians, and others connected with persons of fortune, to betray them into improper marriages. (*b*)

31. Bonds, or any other securities, given *for the purpose of obtaining appointments to offices of trust*, under government, are also void. (*c*)

*32. It has been stated, in a former title, that *trustees* *412 are *not allowed* by the Court of Chancery *to become purchasers* of the estate. This rule is extended to *assignees of bankrupts*, and *solicitors* to the commission. (*d*)

33. In a late case, a purchase of the bankrupt's estate, by the solicitor to the commission, was set aside, though he gave the full value for it, at a public auction. And Lord Eldon declared, he would set aside all purchases made by persons having a confidential character, however honest the circumstances. (*e*)

34. It has been determined by the House of Lords, that no gift or gratuity to *an attorney*, beyond his fair and professional demands, made during the time that he continues to conduct or manage the affairs of the donor, shall be permitted to stand. And more especially, if such gift or gratuity arises immediately out of the subject then under the attorney's conduct or management; and more especially, if the donor is, at the time, ignorant of the nature and value of the property so given. (*f*)[1]

(*a*) Treat. of Eq. B. 1, c. 2, ss. 9, 10. Pickett *v.* Loggon, 14 Ves. 215. Huguenin *v.* Baseley, Id. 273. Dunnage *v.* White, 1 Swanst. 137. Gwynne *v.* Heaton, 1 Bro. C. C. 1. Peacock *v.* Evans, 16 Ves. 512. (1 Story Eq. Jur. § 244–250.) [Robinson *v.* Robinson, 4 Md. Ch. Decis. 176.]

(*b*) Treat. of Eq. B. 1, c. 4, s. 10. Hall *v.* Potter, Show. Parl. Ca. 76. Cole *v.* Gibson, 1 Vez. 503. (1 Story Eq. Jur. § 260–263.) (*c*) Tit. 25, s. 83.

(*d*) Tit. 12, c. 4, s. 52. (1 Story Eq. Jur. § 321–323.)

(*e*) Ex parte James, 8 Ves. 337.

(*f*) Middleton *v.* Welles, 4 Bro. Parl. Ca. 245. 1 Cox R. 112. 12 Ves. 371.

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[1] See 1 Story, Eq. Jur. § 310–313, where the cases to this point are cited.

35. *Weakness of understanding* is also a ground upon which a court of equity will invalidate a deed.[1] But Lord Thurlow has observed, that there is an infinite, nay an insurmountable difficulty, in laying down abstract propositions upon a subject which depends on such a variety of circumstances, as the legal competency of the mind to the act in which it is engaged; if its competency be impeached by positive evidence of an anterior derangement, or affected by circumstances of bodily debility, sufficiently strong to lead to a suspicion of intellectual incapacity. (*a*)

36. "If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement; if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burden of proof attaches on the party alleging such lucid interval; who must show sanity and competence at the period when the act was done, and to which the lucid interval refers. And it certainly is of equal importance, that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and demonstrative of such fact, as where the object of the proof is to establish derangement." (*b*)

413 * *37. If a *woman, on the point of marriage*, charges or *conveys away her estate to a stranger, without the knowledge of her intended husband*, such charge or conveyance will be void in equity; being in fraud of the right which the husband acquired to his wife's property by the marriage. (*c*)

38. Thus, *where a woman entered into a recognizance the day before her marriage*, it was set aside by the Court of Chancery, and a perpetual injunction granted; though one witness deposed that the intended husband consented to the drawing of it; but that person had an assignment of it himself. (*d*)

(*a*) Att.-Gen. *v.* Parnther, 3 Bro. C. C. 441. (1 Story Eq. Jur. § 234-238.)
(*b*) Idem. Lewis *v.* Pead, 1 Ves. 91. 14 Ves. 91, 273. Say *v.* Barwick, 1 Ves. & Bea. 195.
(*c*) (1 Story Eq. Jur. § 278. 2 Kent Comm. 174, 175, 5th ed.)
(*d*) Lance *v.* Norman, 2 Rep. in Cha. 41.

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[1] [Dickens *v.* Johnson, 7 Geo. 484; a deed may be avoided for the drunkenness of the maker at the time of executing it, though the party claiming under the deed had no part in causing the drunkenness. Donelson *v.* Posey, 13 Ala. 752.]

39. So, where a widow*made a conveyance of her estate*, prior to her second marriage, and without the privity of her intended husband; it was decreed that the second husband should enjoy the estate notwithstanding. (*a*)

40. It was determined, upon the same principle, that a conveyance made by a woman before her marriage, without the privity of her intended husband, *to trustees for her separate use*, was void, against her husband. (*b*)

41. Lord Hardwicke has said, that if a woman about to marry, gives away a part of her property, or gives a security on, or assignment of it, they are relievable against in Chancery. But *where a debt is contracted for a valuable consideration*, though concealed from the husband, it is *no fraud* on the marriage. (*c*)

42. Where *a widow makes a provision for her children by her first husband*, in contemplation of a second marriage, the case is very different; for there she is performing *a moral duty*. But still, this must not be concealed from the man she is going to marry; or, if not made in contemplation of a second marriage, it must be done publicly.

43. Where a widow assigned over the greater part of her property to trustees, in trust for herself during her widowhood, and in the event of her marrying again, in trust for her second son; but the conveyance was made publicly, and prior to the marriage treaty with her second husband; on a bill filed by the husband, to set aside this conveyance, Lord King dismissed it, saying, it was a very reasonable thing for a widow, while it was in her power, to make a provision for her children by her former husband. And this being before her treaty of marriage with the plaintiff, it had been impossible to have asked him to be a party thereto, he not being then thought of. (*d*)

*44. The Countess of Strathmore, a widow, having *414 five children, and being tenant for life of a very considerable real estate, on the 10th of January, 1777, executed a deed, whereby she conveyed all the estate whereof she was seised for life, to two trustees, upon trust for her sole and separate use, exclusive of any husband she should thereafter marry, with a power of revocation. This settlement was in fact made in contempla-

(*a*) Howard *v.* Hooker, Id. 42. (Tucker *v.* Andrews, 1 Shepl. 124.)
(*b*) Carleton *v.* Dorset, 2 Vern. 17.
(*c*) 2 Vez. 264.
(*d*) Cotton *v.* King, 2 P. Wms. 358, 674.

tion of Lady S.'s marriage with a Mr. Grey; and was with his knowledge and consent. But on the 17th of the same January, she married Mr. Stoney, who afterwards took the name of Bowes. In the following month of May, Lady S., by the terror of personal violence, was compelled by her husband to execute a deed of revocation of the conveyance made before her marriage. In the year 1785, Lady S. quitted Mr. Bowes, her husband, and ever after lived separate and apart from him; and exhibited her bill against him, to have the conveyance made before her marriage established; and to set aside the deed of revocation. An issue was directed to try whether the deed of revocation was obtained by duress, and the jury found that it was. (*a*)

The cause then came on before Mr. Justice Buller, sitting for the Chancellor, who decreed that Lady S.'s conveyance before marriage should be established; and upon a re-hearing before Lord Thurlow, this decrée was affirmed.

On appeal to the House of Lords, it was argued on behalf of Mr. Bowes: —

I. That the conveyance was a fraud upon the contract of marriage, being made without the knowledge of the appellant, and concealed from him at the time of such marriage.

II. That although such conveyance was suggested to have been made in contemplation of a marriage, intended between Lady S. and another person, yet such marriage did not take effect. And although the disposition made by that conveyance might not be fraudulent as against a person knowing of, and consenting to such disposition; yet as it would be clearly fraudulent against creditors or purchasers for a valuable consideration, there was no sound reason why the same should not be deemed fraudulent as against the appellant; who by the marriage gave to Lady S. a legal title to dower in his own estate, worth at that time, as he asserted, about £1000 a year; and became responsible for all the obligations of a husband, and particularly for debts contracted, or to be contracted by her.

415* * III. That all the cases which had been determined by courts of equity upon the subject, agreed in regarding such a disposition as fraudulent and void; especially where made

(*a*) Strathmore *v.* Bowes, 2 Bro. C. C. 345. (See Perkins's ed. notes.) 1 Ves. 22. 6 Bro. Parl. Ca. 427. 2 Cox, R. 28.

merely and only for the immediate and separate benefit of the person making it.

IV. That if the decrees complained of should be established, a precedent would exist, destructive of confidence in every matrimonial engagement; and leading to consequences subversive of all the grounds on which the law of this country, with respect to the obligations on husbands, by force of the contract of marriage, is founded.

On the other side, the respondent submitted the following reasons for the affirmance of the decrees:—

I. That by the law of this country a woman, while unmarried, may dispose of and convey her property in any manner she pleases; and a husband whom she afterwards marries, without any settlement made by him, or any inquiry concerning her fortune, has no right to impeach any conveyance which she has made of her property, for her own separate use.

II. That there was no instance, in which conveyances made by a woman of her property, before marriage, had been deemed void, because they had not been disclosed to her husband; unless attended with such circumstances, as proved such conveyances to be fraudulent; and that such conveyances were, in the case of a second marriage, where there were children by a former one, reasonable and laudable, and often favored in a court of equity.

III. That it was impossible to look at the circumstances of this case, without perceiving that such a conveyance as the appellant attempted to impeach, might be extremely reasonable. That if it were possible to conceive the husband, of all others, who ought the least to be permitted to question any such dispositions made by a wife, the appellant was that husband. That every step by which he acquired his supposed marital rights, was grossly fraudulent; and therefore it would be an extraordinary administration of equity, to give him the property of his wife, which the law had secured to her, as a reward of his fraud. That his attempt to invalidate the deed in question, must appear still more extraordinary, it having been determined that he, by the terrors of personal violence, had extorted from the respondent * another deed, for the purpose of defeating this, *416

which, by the appeal, he contended was in itself void. The decree was affirmed. (†)

45. This doctrine *applies as well to a deed made by a man, as to one made by a woman.* Thus, where a father got his son to execute a deed secretly, on the morning of his marriage, charging the estate which was settled; it was set aside by the Court of Chancery, as being in fraud of the marriage agreements. (*a*)

46. Lord Chief Baron Gilbert has said, that if a husband seised in fee should, immediately before his marriage, vest the legal estate *in trustees, to disappoint his intended wife of dower*, such a conveyance would be reckoned *fraudulent;* because it was made with an ill conscience, in order to deprive his wife of the provision made for her by the common law. (*b*)

47. By a marriage settlement, in consideration of the marriage, and of £2000, the portion paid to the intended husband, his father granted to the lady an annuity of £400 in full for her jointure, and in lieu of dower. (*c*)

By a bond of the same date, the son became bound to his father in the penal sum of £3000, with condition, reciting the intended marriage, and that the son, not having it in his power to settle a jointure upon his intended wife, his father had agreed to secure to the lady a yearly rent charge of £400 out of his estates, which he had done; and in order to induce the father to grant the rent charge, the son had agreed to enter into a bond for the purpose of indemnifying his father against the payment of the rent charge. The son died, leaving his wife surviving, and his executors brought a bill against the executors of his father, charging that the bond was a fraud upon the settlement, and the parties; that it was privately settled and agreed upon between the husband and his father, that neither the wife, nor her father, was informed that any such bond was to be entered into; and that the father made use of his influence, as father, to induce his son to give the bond. The bill prayed accordingly, that the bond

(*a*) Martins *v.* Bennet, Bunb. 336. Turton *v.* Benson, 1 P. Wms. 496. (1 Story, Eq. Jur. § 268–272.

(*b*) Gilb. Cha. 267. Show. Parl. Ca. 71.

(*c*) Palmer *v.* Neave, 11 Ves. 165.

[† This case is not reconcilable with the preceding ones. The determination was clearly founded on the very improper conduct of Mr. Bowes, before and after his marriage.—*Note to former edition.*]

might be declared a fraud upon the marriage settlement, and so void.

Sir W. Grant, M. R., said there was no distinction in principle *between this and the other cases; it being as *417 much a fraud upon the faith of the marriage contract; for it affected to put the party, contracting for marriage, in one situation by the settlement, but putting that party in another, and in a worse situation, by a private agreement. The parent, in this case, professed himself to settle the jointure; the son, therefore, according to that, was to have no part of the burden thrown upon his property; but by the private agreement, the burden was thrown altogether back upon the son. It was of no consequence that the lady was equally or more secure; for the contract proceeded upon this, that he was found the means of providing for her, without resorting to his own fortune; whereas the effect of the private agreement was to throw the burden entirely upon his fortune, by which he was, to that extent, prevented from providing for his family, as he otherwise might. This was just as much a fraud upon the marriage contract, as if, receiving a fortune, he returned part of it; his capacity of providing for his family was equally diminished in both cases. There was, therefore, no distinction upon which this case could be taken out of the effect of the principle. The bond was decreed void.

48. Where *the consideration of a deed is immoral*, the deed is void, both at law and in equity; and therefore a bond, given to a woman *as the price of prostitution*, is void in law.

49. Upon oyer being prayed of a bond, it appeared to be from W. Perkins to the plaintiff, Sarah Walker, in a penalty, reciting that Perkins and the plaintiff had agreed to live together; therefore he had contracted to find her meat, drink, &c., and to leave her an annuity of £60 a year, if he quitted her, or she outlived him; and if they had any child, he was to provide for it; but if she should leave him, or go to another man, then he should not be obliged to provide for her any longer, or to leave her any annuity. The defendant pleaded that this was an agreement between the plaintiff and his intestate, to live together in a state of fornication; and that such a bond, made upon such an agreement, was void in law. In reply to this plea, the plaintiff alleged that she was a virgin, and was seduced by the intestate; and in

consideration thereof, this bond was given to her; and that it was *præmium pudicitiæ.* The defendant demurred. (*a*)

Lord Mansfield said, it was the price of prostitution; 418* for if *she became virtuous, she was to lose the annuity. The bond was therefore illegal and void.[1]

50. In a case of *seduction*, where a bond is given for securing an annuity, or a sum of money, for the support and maintenance of the person seduced, and not with any view to a future cohabitation, a court of equity will not relieve.

51. The Marquis of Annandale seduced a young woman named Harris, by whom he had a child; afterwards, by deed poll, he agreed that £2000 should be laid out in an annuity for her benefit and that of the child. The widow of the Marquis brought her bill to be relieved against this deed, as made upon an unlawful and wicked consideration; and Ann Harris brought her cross bill to be paid the £2000 out of the assets of the Marquis. It was urged, on behalf of Ann Harris, that the known diversity was, where the woman had before been a common prostitute, and drew in a young man to give such bond or covenant, in such case equity would relieve. But where the man seduced a woman who was before modest, and gave such bond or covenant, there the obligor, who had done the injury, stated and ascertained himself the damages which were to be the *præmium pudicitiæ;* and no relief was given in equity. (*b*)

On the other side, it was objected that, supposing equity would not relieve against such bond or covenant, yet it being a matter of turpitude, equity ought not to intermeddle. The consequence of which would be, that both bills should be dismissed, and that the Court should not lend any assistance, on account of assets, or otherwise, in such a case.

Lord King said, if a man does mislead an innocent woman, it is both reason and justice he should make a reparation; and decreed that the debt should be paid out of the assets; which was affirmed by the House of Lords. (*c*)

(*a*) Walker *v.* Perkins, 3 Burr. 1568. 1 Black. R. 517.
(*b*) Annandale *v.* Harris, 2 P. Wms. 432. Cray *v.* Rooke, Forest, 153.
(*c*) 1 Bro. Par. Ca. 250.

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[1] See Franco *v.* Bolton, 3 Ves. 371; Knye *v.* Moore, 1 Sim. & Stu. 61; 2 Sim. & Stu. 260, S. C.; Clarke *v.* Periam, 2 Atk. 333; Robinson *v.* Gee, 1 Vez. 254; Hill *v.* Spencer, Ambl. 641.

52. Although there be no seduction, yet if a man gives a bond to a woman, *on account of a former cohabitation*, an action at law may be maintained upon it.

53. In an action of debt upon a bond, the defendant prayed oyer of the condition, which was in these words: "Now the condition of this obligation is such, that, in consideration of cohabitation had by the above-bounden T. V. with the said Catherine, he the said T. V. hath hereby agreed to secure to the said * Catherine the yearly sum of £30, &c. The Court held *419 that the bond was good. (*a*)

54. Though the woman to whom such a bond be given, was a common prostitute, yet it will not be set aside in equity.

55. Lord Hardwicke has laid down a very proper distinction, in cases of this kind, between a married man and a bachelor; and has determined that, where a *married man* gives a bond to a woman whom he has seduced, *she knowing him to be married*, as a *præmium pudicitiæ*, it shall not be supported in equity.

56. A bill was brought for payment of £100 and an annuity of £40, which was granted by the defendant to the plaintiff, who being a young woman, came to live in the family of the defendant, then a married man, as a companion to his sister; and afterwards occasioned a separation between him and his wife. (*b*)

Lord Hardwicke said, the case was in some parts new, nor did he remember it had directly come before the Court. The consideration of the grant was plain; for though expressed to be for divers causes and considerations, it was plain, on the evidence, to what it was applied; nor was it disputed. It was plain also to him what this unhappy woman (who had been very criminal also) had submitted to, was from the seduction of the defendant; for her youth, when she came into the family, and good character before, were evidence thereof. And that certainly had been the principal ground of the determinations in that Court, where it had been considered as *præmium pudicitiæ*, when the young woman submitted to the suggestions of the man, and was guilty of no fault before. But he knew of no case where the Court had given countenance to these sort of bonds in case of a married man, she knowing it; that differed the case, because persons

(*a*) Turner *v.* Vaughan, 2 Wils. R. 339. Gray *v.* Mathias, 5 Ves. 286.
(*b*) Priest *v.* Parrot, 2 Vez. 160.

who submitted to a temptation of that sort, were without excuse; they knew absolutely they were doing a wrong which could not be healed, and which occasioned mischiefs to families. That differed it from the cases wherein the Court had gone some length to make a provision for such unfortunate people. The bill was dismissed. (*a*)

57. It has been stated that, where lands are once liable to a *crown debt*, the *lien continues*, into whose hands soever they pass, even though conveyed by the debtor to a *bonâ fide* purchaser for a valuable consideration. It follows that all such
420* *conveyances are void as against the King, though good and valid against all other persons.[1] Thus, it is said, that if a man becomes debtor to the King, being seised of land in fee, and after aliens the land, yet it may be put in execution, though the alienation was before any action commenced; for it relates to the time when he became indebted to the King, and after. (*b*)

58. Thomas Favell, a collector of the fifteenth and tenth, being seised of certain lands in fee, *die intromissionis de collectione*, in extremity of illness, aliened his estate, and died without heir or executor. It was held that process should issue against the terre-tenants, to answer and satisfy the King thereof. (*c*)

59. Sir William Cavendish, who was treasurer of the chamber to King Henry VIII., Edward VI., and Queen Mary, being indebted to the Crown, purchased lands, which he afterwards aliened; and of part took an estate to himself and his wife, and part remained in the hands of others; and died without rendering an account. It was debated whether or no these lands could be seized into the hands of the Queen, and be retained by the course of the common law, till an account was made by Cavendish; for he was not bound to the Crown in any recognizance or obligation, but the matter of the seizure rested entirely upon the common law. (*d*)

All the Barons of the Exchequer agreed that the seizure was

(*a*) Matthews *v.* ——, 1 Mad. 558. And see Knye *v.* Moore, 1 Sim. & Stu. 60. 2 Sim. & Stu. 260, S. C.

(*b*) Tit. 1, s. 65. 2 Roll. Abr. tit. Prerog. B. pl. 1.

(*c*) Favell's case, Dyer, 160 a. 12 Rep. 3.

(*d*) Seyntloo's case, Dyer, 224 b. Plowd. 321.

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[1] The United States have no such lien by prerogative. See *ante*, tit. 1, § 63, note.

lawful; for the Crown might have seized the lands in the hands of Cavendish; and by the same reason, in the hands of every one that came in under him; for *nullum tempus occurrit regi.* And Plowden says, Sir W. Seyntloo, who had married Cavendish's widow, having intelligence that the law was against him and his wife, compounded with the Queen, by paying £1000 into the Exchequer, and got a release and pardon for the residue; and in the pardon it was recited, for the maintenance of the prerogative, that the law was with the Queen.

60. Where a person is an accountant to the Crown, and sells his lands, not being indebted to the Crown at the time of the sale, yet if he afterwards becomes indebted to the Crown, in his situation of accountant, his lands may be seized by the Crown, in the hands of the purchaser, in consequence of the statute 13 Eliz. (*a*)

61. Sir C. Hatton being remembrancer, and collector of the *first fruits, for his life, after the death or surrender *421 of one Godfrey, who then held that office in possession, and being seised in fee of divers manors, settled them to the use of himself for life, remainder to his son in tail. He afterwards became indebted to the Crown by reason of his office; and the question was, whether the lands, thus settled, could be extended for the debt. It was resolved, that although Sir C. Hatton was not indebted to the Crown, at the time when he made the settlement, yet, having become indebted to the Crown ten years after, the lands comprised in the settlement were liable, by reason of the retrospect of the words in the statute, 13 Eliz., "as if the same treasurer, receiver, &c., had, the day he first became accountant, stood bound by writing obligatory, having the effect of a statute staple to her Majesty, her heirs or successors, for payment of the same." (*b*)

62. An alienation *bonâ fide*, prior to the acceptance of an office which renders the person accepting an accountant of the Crown, is good; and it was said *arguendo*, in a subsequent case, that if a man is a receiver to the King, and not indebted, but clear; and sells his land, and ceases to be a receiver; and afterwards is appointed to be a receiver again; and then becomes indebted to the Crown, the sale is good. (*c*)

(*a*) Tit. 1, s. 63, 65. (*b*) Coke's case, Godb. 289. 10 Rep. 55 b.
(*c*) Coxhead's case, Moo. 126. Att.-General *v.* Alston, 2 Mod. 247.

63. It has been stated, that an assignment of a term for years, by a person indebted to the Crown, before any execution awarded, is good. This doctrine does not, however, apply to terms for years, which are attendant on the inheritance; for in that case, if the King extends the inheritance, he will become entitled to the term. (*a*)

64. Colonel Montressor, being seised in fee of a freehold estate, and there being an old term for years in the lands outstanding, which was assigned to attend the inheritance, sold the estate in 1795, to Mr. Smith; and the term was assigned to a trustee for him. At the time of this sale, Colonel M. was indebted to the Crown, but Smith had no notice of that circumstance when he purchased. The Crown issued an extent against Col. M., and the sheriff seized the lands purchased by Smith. A question arose in the Exchequer, whether the outstanding term, which was held in trust for Smith, should protect him against the claim of the Crown. (*b*)

The Lord Chief Baron said, that the case which came 422 * nearest to * this was that of the Attorney-General *v.* Sands, where it was resolved, that as the inheritance was not forfeited, the term was not forfeited; for being a term attendant, it was but an accessary to the inheritance. If the converse of this case was considered, it would make it still more clear; if the inheritance had been forfeited, the term must have been forfeited also. In deciding according to the course of the common law, he thought it clear that an outstanding term could not defeat the King's process by extent. In Courts of Equity, it was said, a purchaser without notice was a person favored; perhaps it might be a sufficient answer to say, that in this case they were not in a Court of Equity. The question was, what ought to be the decision of a Court according to the common law. This question could not be decided in a Court of Equity; they could not sue for a decree. When a Court of Equity was resorted to, and this was the situation of the parties, the Court did nothing but stand neuter between such parties; and leave them to make the most of it. He thought, on the whole, the land was chargeable that had been in the hands of the King's debtor; and from the cases that had been decided, it was sufficiently clear, that the

(*a*) Tit. 8, c. 2, s. 20. Nicholls *v.* Howe, 2 Vern. 389.
(*b*) Rex *v.* Smith, in Scacc. An. 1804. Sugden, Vend. Appdx. XVI.

term was; it was the whole interest in the land, whether it was divided or not. Now that being so, it should seem to be the result of what was to be found in the books, that of the King's common-law remedy, it was impossible to doubt, and that remedy was given in every case, where the party, who was indebted to the Crown, had a present beneficial interest, as well as a reversion; both of these were considered as chargeable for the debt of the Crown. The lands of the King's debtor might be extended by the Crown, in whatever hands they were found; and therefore, upon the whole, the judgment must be for the Crown. (*a*)

(*a*) Ibid. 12, c. 2. Tit. 12, c. 3.

NOTE.—The priority of the Crown, in the cases stated in the text, seems not to be admitted in the British American Colonies. The doctrine was discussed with great ability, by the learned Chief Justice of Nova Scotia, in the case of Uniacke *v.* Dickson & al. decided by the Chancellor, in 1848, in which he was assisted by the Chief Justice and Mr. Justice Hill. As the opinion of the Chief Justice cannot but be interesting to the student, for its lucid exposition of the principles and extent of the application of the laws of England to the provinces of the Empire, and the case is not known to have been published in any book of reports, its insertion here will not require an apology. His opinion was delivered in the following terms:—

"The proceedings in this case commenced under an ordinary bill of Foreclosure, which was filed by the complainant on the 30th of August, 1845, to foreclose the equity of redemption of a mortgage given to him by the defendant, Dickson, on the 28th of December, 1837, of certain lands, &c., in the county of Pictou.

"The defendant himself has never appeared, (although the usual process has been served upon him,) to oppose the prayer of the bill; but on the 20th of January, 1846, the Attorney-General interposed on behalf of the Crown, and filed an answer, stating that, prior to the date of the mortgage, the defendant, Dickson, had been appointed collector of Impost and Excise duties of the District of Pictou, which rendered him an accountant to the Crown, under the 13 Elizabeth, cap. 4. That, upon entering on that office, he had given a bond to the Crown, in the sum of £1000, for the faithful discharge of his duty—which Bond, under the 33 Henry 8, cap. 39, became a debt of record, and rendered all his real estate liable to the claims of the Crown under the said bond, as he had become a defaulter to a large amount.

"The two statutes are set out in the answer, and the right of the Crown to interfere between these parties is therein entirely founded upon them,—although, at the argument, it was contended that these statutes gave the Crown no new rights, but merely facilitated its remedies in enforcing the rights which it before possessed. I cannot view these statutes in that light. The old principle, that the Crown can neither take or part with any thing but by matter of record, which, as a general rule, is so wholesome and safe, both for the Crown and the subject, was partially infringed by each of these statutes. By the 33d Henry 8, bonds to the Crown were placed upon the same footing with statutes staple, without having their publicity; and by the 13th of Elizabeth, all the lands, held by the officers therein mentioned, were bound for debts subse-

quently incurred, even when transferred to *bonâ fide* purchasers, under sales made at a time when no debt was due by the vendor to the Crown.

"I would not be understood as presuming to question the wisdom of the legislature who passed these laws—I am only meeting the assertion, that they gave no new rights to the Crown, but merely provided it with additional remedies, to enforce rights previously possessed.

"Before we enter, therefore, upon the consideration of many points which were submitted to the Court by each party upon the presumption that these statutes were in force in this Province, we must decide upon the main objection, taken by the complainant's counsel, that they are not in force here.

"To what extent the laws of the mother country prevail, in the colonies settled by her descendants, is a question which has occasioned much discussion, without producing any rule approaching to precision for our guidance.

"The language of elementary writers, upon this subject, is couched in such general terms, and qualified by such numerous exceptions, that they perplex rather than enlighten us.

"Our excellent Blackstone, for instance, says, in his commentaries, (1st Vol. 107): 'It hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, (which are the birth-right of every subject,) are immediately there in force.' Had the learned Commentator stopped here, he would indeed have laid down a rule so broad as to embrace every case and remove all difficulties; no distinction is alluded to between the common and statute law, but all the laws, then in force in England, are to be at once transplanted into the infant colony.

"His own good sense, however, at once pointed out to him the absurdity of such a position, and he immediately adds,—'But this must be understood with very many and very great restrictions;—they carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony.' And among his exceptions he particularly mentions the laws of Police and *Revenue*.

"Among the colonists themselves, there has generally existed a strong disposition to draw a distinction between the common and the statute law. As a code, they have been disposed to adopt the whole of the former, with the exception of such parts only as were obviously inconsistent with their new situations; while far from being inclined to adopt the whole body of the statute law, they thought that such parts of them only were in force among them as were *obviously* applicable to, and necessary for them.

"As it respects the common law, any exclusion formed the exception; whereas, in the statute law, the reception formed the exception.

"Now, although this view of the subject leads us to nothing very precise, yet, if we adopt it, and I think it wise and safe to do so, we must hold it to be quite clear, that an English statute is applicable and necessary for us, before we decide that it is in force here.

"The language of Chief Justice Chipman, in the case of The King *v.* McLaughlin, might induce us to suppose that he did not recognize this distinction, for he says,—'As to the distinction attempted to be drawn by the counsel for the claimants between the common law and statute law extending to the colonies, other statutes than those mentioned by the Solicitor-General are daily acted upon;' but when I turn to the expressions of this able Judge, at the commencement of his opinion, I think he sanctions the distinction;—he there says: 'Each colony, at its settlement, takes with it the common law and all the statute law applicable to its colonial condition.' Indeed the distinction exists in the very nature of things, and is derived from

the origin of the two codes. The common law has its foundations in those general and immutable principles of justice which should regulate the intercourse of men with men, wherever they may reside. The statute law emanates from the wisdom of the legislature of the day;—varies with varying circumstances, and consists of enactments which may be beneficial at one time and injurious at another;—which might advance the interest of one community, and prove ruinous to those who were differently situated.

"My venerable predecessor, Chief Justice Blowers, who presided so ably in the Supreme Court for many years, inclined to the opinion, that those statutes only which were an amelioration of the common law, and increased the liberty of the subject, were in force here; and though, (as we have no reports of the decisions,) my memory does not enable me to mention any particular case which he decided upon that principle, I well recollect that he was invariably influenced by it in all cases to which it was applicable.

"It has been contended that the 33d of Henry 8, is an amendment of the common law, and I observe that Mr. Justice Botsford, in the case I have alluded to, (Rex *v.* McLaughlin,) gave a reluctant assent to the adoption of it in New Brunswick, upon that ground. The 74th section, to which he particularly alluded, may, perhaps, be deemed to have that tendency, although conflicting decisions have been given in cases arising upon it in Westminster Hall; but surely, taking the statute as a whole, it never can be considered in that light. But, without excluding either statute upon that ground alone, let us inquire upon what ground they are now for the first time to be adopted, when we have had a local legislature for nearly a century, fully empowered to make such laws as the interest of the colony has required.

"Before I enter upon this part of the subject, I would observe, that although this claim on the part of the Attorney-General is theoretically founded upon what is termed a right of the Crown, it is not, in fact, a contest between the monarch and a subject, involving questions arising out of the prerogative of the one, and the privilege of the other, as it would have been in the days when these statutes were passed. The King has no longer that personal interest in questions of revenue that he formerly had, and therefore, if the public interest should require that our provincial revenue should be further protected, in case these statutes do not extend to us, no fear of increasing the royal prerogative would prevent the local legislature from adopting all necessary guards and precautions.

"In continuing his observations upon the extension of the laws of England to the colonies of the empire, Blackstone says, in the same page from which I have already quoted, "What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own Provincial Judicature, subject to the revision and control of the King in Council." It is not contended, that either of these statutes have ever received this sanction, in Nova Scotia. The attempt to enforce them here is now for the first time made; and it appears to me to be incumbent upon those who preside in the respective Courts of Judicature in this Province, gravely to consider, whether the adoption of their provisions, if it be judicious to adopt them, is not now rather the province of the legislature than the Courts.

"In the early settlement of a colony, when the local legislature has been just called into existence, and has its attention engrossed by the immediate wants of the members of the infant community in their new situation; the courts of judicature would naturally look for guidance, in deciding upon the claims of litigants, to the general laws of the mother country; and would exercise greater latitude, in the adoption of them, than they would be entitled to do, as their local legislature, in the gradual development of its powers, assumed its proper position. Every year should render the Courts more cau-

tions in the adoption of laws, that had never been previously introduced into the colony; for prudent Judges would remember, that it was the province of the Courts to declare what *is* the law, and of the legislature to decide what it *shall be*.

"Impressed with this view of the distinct functions of the Legislature and the Courts at this period of our colonial existence, it does appear to me that if additional fiscal regulations are necessary, to insure the due collection and payment of our Provincial Revenue, it would be more proper to apply to the legislature to adopt such as they may deem prudent, than to require from the Courts the adoption of English statutes, which were passed centuries ago, under sovereigns, who were sufficiently careful of the preservation of their power, and by Parliaments who, to say the least, paid as much attention to the prerogatives of the Crown as they did to the privileges of the people;—statutes, the rigors of which have been diminished in the mother country during the reign of our present gracious Queen. (5 Victoria, cap. 11.)

"Should this course be pursued, our legislature can introduce similar ameliorations of these statutes, if they think it right to adopt them. The Courts have no such power; but, if they adopt them at all, must adopt them in all their rigor.

"The 33d of Henry 8, if enforced here as it now stands in the English statute-book, would, to a great extent, be destructive of that security to purchasers of real estate which our Registry Acts were passed to ensure.

"The 13th of Elizabeth would partially have that effect also; but not so mischievously, because the officers, liable to its provisions, would be generally known. But bonds to the Crown, in security for the payment of duties, are given all over the Province by persons engaged in trade, and others, and no one could be sure that he was safe in purchasing real estate, if that statute should now be adopted.

"There is another objection to the adoption of these statutes which I think has some weight. The Supreme Court has generally considered, that when the local legislature have legislated upon any particular subject, relative to which English statutes had previously existed, that the Colonial Courts are to be guided by the Provincial and not the English statutes in deciding questions upon such subjects. Thus, upon a claim of a mother to succeed to the personal estate of her deceased child, to the exclusion of her other children, the Supreme Court of this Province decided that she was entitled to do so, because our legislature had reënacted the provisions of the statutes of Charles the 2d upon that subject, but had not (at that time, although they have since), reenacted those of 1st James the 2d, which latter statute had passed before we had a local legislature.

"Now, our legislature have had the subject of the securities, necessary to be given for the safe collection of the revenue, under their consideration, and have passed laws upon that subject, which direct that the officers, appointed to collect it, shall give bonds, in which they shall be joined by sureties, for the faithful discharge of their duties; and that those who import goods liable to pay duties to the Crown, under the Acts of this Province, shall not only give bonds for the payment of those duties as they become due, but shall also give warrants of attorney to confess judgment upon those bonds; a measure that would have been unnecessary if the statute of Henry 8 was in force here, for that statute would have made the bonds themselves debts of record. If these securities are not sufficient, the legislature, and not the Courts, should be applied to to remedy the evil.

"For these reasons I am of opinion that these statutes, on which the Attorney-General has founded the right of the Crown to interpose in this case, are not in force here, and consequently that right cannot be sustained by them.

"But although the right of the Crown is entirely founded upon the statutes, in the answer which the Attorney-General has put in, it was insisted upon at the argument

that, independent of the statutes, the Crown had such right at common law; and the cases alluded to by Chief Baron McDonald, in giving the opinion of the Court, in the King *v.* Smith, (Wightwick, 34,) were relied upon, to show that the lands of known public officers were bound for their debts to the Crown, prior to the statute, and could only be sold by them subject to such liability. These cases, however, were not spoken of by the Chief Baron in that case, with any degree of commendation, and the position of the Attorney-General, in the case of Mines, in Plowden, "That if any one is accountant to the King, or if any money, or goods, or chattels personal of the King, come to the hands of any subject by matter of record, or by matter in *fait*, the land of such subject is charged therewith, and liable to the seizure of the King, into whatsoever hands it comes afterwards; be it by descent, or purchase, or otherwise," was deemed much too broadly laid down; and his Lordship decided in favor of the defendant, Smith, and against the Crown—although Colonel Loft, through whom the defendant claimed, was indebted to the King in £26,320 at the time that he made the conveyance, but before the debt became matter of record.

"Colonel Loft had received this money for the purpose of the levy of a regiment, but had applied no part of it to that purpose. The Court of Exchequer held, that he was not such accountant, either under the statute of Elizabeth, or at common law, as would render lands liable in the hands of a *bonâ fide* purchaser, under a purchase made after the debt incurred, but before it became matter of record.

"It might, however, be assumed, from what fell from the Chief Baron in this case, that the lands of known public officers, (which he did not deem Colonel Loft to have been,) would be so bound at common law; but in the case of Casberd *v.* The Attorney-General, (6 Price, 411,) no sanction is given by Chief Baron Richards to that position. There, the Attorney-General had urged upon the Court the right of the Crown against the debtor, (who was a collector of assessed taxes,) both at common law and under the statute; and yet the Chief Baron, in giving the judgment of the Court upon this part of the case, takes no notice of the claim of the Crown at common law. He was of opinion that the debtor was not one of those persons enumerated in the statute of Elizabeth; although, he said, 'It was quite clear that he was liable to the process of the Crown in respect of the money which he had received as collector of the taxes; but it does not follow that he was therefore that kind of debtor to the Crown, which would bind his lands, so as to affect the existing equitable or legal interest of any third person in them.' His Lordship then proceeds: 'If he were a debtor to the Crown, of record, or one of the persons described in the 13th of Elizabeth, there is no doubt at all, that whether there was a legal or an equitable mortgage on his lands, it would not have affected the Crown; for the Crown would have a right the moment he became a debtor of record, or came within the statute of Elizabeth, to have seized his lands, although they should have been subsequently mortgaged; but if he was not a debtor on record, nor had given bond to the Crown, and if he was not within the statute of Elizabeth, (which is at last the only real question in this case,) then he was merely an ordinary simple contract debtor, and the Crown had no right to the estate at the time of the incumbrance.'

"Here the Chief Baron puts the right of the Crown upon three grounds:

"1st. A debt on record.

"2d. A bond debt, under the statute of Henry 8.

"3d. Holding an office which came under the statute of Elizabeth. And passes unnoticed the claim of the Attorney-General, to resist the mortgagee upon the King's common-law right.

"Now, if the lands of a person, situated as *Jones* the debtor, in that case, were not bound to the Crown at common law before the debt due by him to the King became

matter of record, I cannot see why those of the debtor, *Dickson*, should be so bound;—their situations may not be precisely similar, but in all essential points they resemble each other. *Jones* was not appointed by the Crown, but was under the Receiver General, to whom it was his duty to pay over the taxes he was appointed to collect for the Crown. He received no salary, but was paid, (we must presume,) for his services, by a percentage on the sums he collected for the Crown.

"*Dickson* was not appointed by mandamus from the Crown, as the higher officers of the Government are, but by the Lieutenant-Governor, and it was his duty to pay over all the taxes, he was appointed to collect, to the Treasurer of the Province, who may be considered, who indeed is, the Receiver-General in Nova Scotia. He received no salary, but was paid for his services by a percentage on the sums he collected; and as it respects their being *known officers*, the collectors of assessed taxes in England must be officers as well known as the collector of excise in a country district of Nova Scotia.

"I repeat, that if the lands of such a debtor as *Jones* were not held liable at common law in England, so as to affect the interest of a party who held an equitable mortgage, I think the lands of *Dickson* cannot have been bound here, so as to affect the interest of a party holding a legal mortgage, duly executed and recorded before Dickson became a debtor to the Crown on record.

"Before I conclude, I must advert to the observations of Blackstone, which I have already cited. 'They (the Colonists), carry with them only so much of the English law as is applicable to their own situation, and the condition of an infant colony;' and among his exceptions, he particularly mentions the laws of revenue.

"And well may such laws be excepted. An infant colony must overcome many difficulties before it can raise any revenue; and when it arrives at a state to do so, it has a legislature of its own, who can devise such local and simple rules for its collection and security as circumstances may require, without adopting the more cumbrous code, which the complicated interests of an older country may demand. This, it appears to me, is the course which our legislature has pursued.

"The officers of the Crown seem, in the first instance, to have been of this opinion in Dickson's case. They obtain and record a judgment against him in the common-law Court, which would have been unnecessary if he was already a debtor on record under the statutes of Henry 8, and Elizabeth; they register that judgment in the counties in which his lands lie, as our provincial statute requires, to bind lands under judgments, which would have been equally unnecessary if his lands were already bound, either under the statutes, or the common law.

"I allude to these circumstances, to show how generally the opinion must have prevailed, that the laws of England, relating to the revenue, did not extend to this Province, when the law officers of the Crown proceeded in the first instance, under our provincial statutes, and took steps under them, which they must have deemed quite unnecessary, had they thought that those laws were in operation here.

"After much reflection and some research, I have arrived at the conclusion, that the claim of the Crown in this case cannot be sustained, either under the statutes or at common law—and therefore that the prayer of the complainant's bill of foreclosure ought to be granted.

"The question is a new one here, and I have been little aided by precedent in coming to a decision upon it. Should the principles upon which this decision is founded, be erroneous, I have the satisfaction of knowing that the case can be brought under the consideration of those, who are infinitely more capable than I can be of forming a correct opinion upon it."

CHAP. XXVIII.

WHAT DEEDS ARE VOID AS TO CREDITORS AND PURCHASERS.

SECT. 1. *Statutes in favor of Creditors and Purchasers.*
3. *What Deeds are void by these Statutes.*
4. *Deeds made to defraud Creditors.*
9. *Or to defraud Purchasers.*
12. *Notice is immaterial.*
15. *Voluntary Conveyances void against existing Creditors.*
17. *But not against future ones.*
21. *Voluntary Conveyances void against Purchasers.*
26. *Though with Notice.*
30. *And Conveyances with Power of Revocation.*
SECT. 38. *Who are deemed Purchasers.*
44. *Voluntary Conveyances binding on the Party.*
47. *And good as to subsequent voluntary Conveyances.*
49. *And also as to a Will.*
54. *Proviso for Deeds made on good Consideration.*
57. *Settlements in Consideration of Marriage.*
68. *How far the Consideration of Marriage extends.*
74. *Settlement by a Widow on her Children.*

SECTION 1. By the statute 13 Eliz., c. 5, s. 2, ("for the avoiding and abolishing of feigned, covenous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements, as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore;") made perpetual by stat. 29 Eliz., c. 5, it is enacted, that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods, and chattels, or of any lease, rent, (common,) or other profit or charge out of the same, (by writing or otherwise,) shall be deemed and taken only as against (that) person or persons, their heirs, executors, administrators, or assigns, whose actions, (&c.) by such (guileful) covenous or fraudulent devices, (and practices,) shall be in any wise disturbed, hindered, (delayed,) or defrauded, to be void and of none effect; any pretence, color, feigned consideration, expressing of use, or other matter or thing to the contrary (notwithstanding.)

2. By the statute 27 Eliz., c. 4, s. 2, made perpetual by the statute 39 Eliz., c. 18, it is enacted, "That all and every conveyance, grant, charge, lease, estate, encumbrance, and limitation of use or uses, of, in, or out of any lands, tenements, or other 424 * hereditaments * whatsoever (made) for the intent and purpose to defraud and deceive such person or persons, bodies politic or corporate, as shall purchase the same lands, tenements, or hereditaments, or any rent, profit, or commodity in or out of the same, shall be deemed and taken, only as against that person and persons, bodies politic or corporate, his and their heirs, successors, executors, administrators, and assigns, and against all and every other person and persons lawfully having or claiming by, from, or under them which shall so purchase, for money or other good consideration, (*a*) the same lands, tenements, or hereditaments, or any rent, profit, or commodity in or out of the same, to be utterly void, frustrate and of none effect."[1]

3. With respect to the deeds which are rendered void by these statutes, as against creditors or purchasers, they are of two sorts: I. Deeds made with an *express intent to defraud* creditors or subsequent purchasers. II. Deeds made upon good, but not valuable considerations, which are usually called *voluntary conveyances.* (*b*)

4. As to deeds made with an *express intent to defraud creditors*, no doubt can arise respecting their nullity, under the statute 13 Eliz., [as against third persons,] whenever such an intent can be proved, *even though they should be made upon a valuable consideration:* [but such deeds are good against the grantors; for no man can allege his own fraud in order to invalidate his own deed.] (*c*)

5. In a case determined in 44 Eliz., the following circumstances were held to be *badges of fraud:*—I. The gift was *general,*

(*a*) (See *post*, § 38, 1 Story, Eq. Jur. § 354.) (*b*) *Ante*, c. 2.
(*c*) Doe *v.* Roberts, 2 B. & Ald. 368, 369. *Supra*, c. 27, s. 28. (1 Story, Eq. Jur. § 371.)

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[1] This statute, which is in affirmance of the common law, and has been adopted as the basis of jurisprudence on this subject in the United States, is fully expounded by Mr. Justice Story, in his Commentaries on Equity Jurisprudence, Vol. I., § 353–377. See, also, Shep. Touchst. p. 63–68, by Preston; Sands *v.* Codwise, 4 Johns. 536, 589, 596; Kimball *v.* Hutchins, 3 Conn. 450. [See, also, Beal *v.* Warren, 2 Gray, 447, 456.]

of *all* the donor's goods and chattels, real and personal, *without exception* of his apparel. II. The *donor continued in possession*, and *used them as his own;* (†) and by reason thereof he traded and trafficked with others, and defrauded and deceived them.[1] III. There was *a trust between the parties.* (*a*)

6. A conveyed his estate to the use of himself for life, with power to mortgage such part as he should think fit, remainder to trustees, to sell and pay all his debts; but continued in possession, *and kept the deed; afterwards A became *425 indebted by judgment and bond. It was decreed that this conveyance was fraudulent as against the creditors by bond and judgment; who, not having notice of the settlement, should not come in on an average only with the other creditors. (*b*)

7. It was determined in a modern case, that where a person, having several creditors, conveyed part of his real and personal estate to a trustee, in trust to pay half the rents and profits to the grantor, for his own use, and the residue among certain creditors named in a schedule; without any intention of fraudulently delaying his other creditors; the deed was not void, within the statute 13 Eliz.; and Lord Kenyon said, it was neither illegal nor immoral to prefer one set of creditors to another. (*c*) [2]

8. No creditor can avoid a fraudulent conveyance, *unless his debt is of such a nature as to effect the land;* so that he must obtain a judgment for it.[3]

(*a*) Twyne's case, 3 Rep. 80. Stone *v.* Grubbam, 1 Roll. Rep. 3.
(*b*) Tarback *v.* Marbury, 3 Vern. 510.
(*c*) Estwick *v.* Cailland, 5 Term R. 420. Pickstock *v.* Lyster, 3 M. & Sel. 371.

(†) [But the possession of the debtor is not necessarily a badge of fraud; as where the goods of the debtor were sold under an execution by the sheriff to a creditor for a valuable consideration, who lent the goods to the former owner for a rent which was actually paid. Watkins *v.* Birch, 4 Taunt. 823. See, further, Dawson *v.* Wood, 3 Ib. 256; Reed *v.* Blades, 5 Ib. 212; Steward *v.* Lombe, 1 Bro. & Bing. 506.]

[1] The question, whether the possession of property by the vendor, after the sale, is conclusive evidence of fraud, as an inference of law, or is only *primâ facie* evidence of fraud, open to explanation before the jury, is examined with great ability and research in 2 Kent, Comm. 515–532, to which the student is referred. See, also, an interesting review of the decisions on this point, in 6 Am. Law Mag. p. 308–325.

[2] See acc. Brooks *v.* Marbury, 11 Wheat. 78, 99, note (*a*), where the cases to this point are collected.

[3] In the United States, every debt may affect the land, as well as other property of the debtor; but the question of fraud in the conveyance is not, *ordinarily*, raised by a creditor, until he has caused the land to be taken in execution; though it *may* be

9. With respect to deeds, made with an *express intent to defraud purchasers*, the statute 27 Eliz. was particularly necessary; for it is said by Yelverton, in 37 Eliz., that at common law no fraud was remedied which should defeat an *after* purchase; but that only which was committed to defraud a *former* interest. (*a*)

10. The *mere continuance in possession*, after the execution of the conveyance, if such possession be *consistent with the deed*, is not in itself sufficient evidence of an intent to defraud. (*b*)

11. It is not necessary that the person who sells the land should have made the former conveyance. For it was resolved in 3 Jac., that if a father made a lease by fraud or covin to defraud purchasers, and died; and the son, knowing or not knowing of the lease, sold the land for a valuable consideration, the purchaser should avoid the lease. (*c*)

12. Although the subsequent purchaser (†) should *have notice of the preceding fraudulent conveyance*, yet he will be allowed to invalidate it.

13. Thus, Lord Chief Justice Wray has said, if A, seised of land in fee, makes a fraudulent conveyance, to the intent to deceive purchasers against the statute 27 Eliz., and continues in * possession, and is reputed owner; and B enters into discourse with A for the purchase of it, and by accident gets notice of the fraudulent conveyance, and, notwithstanding, concludes with A, and takes assurance of him; in this case B should avoid the fraudulent conveyance by the said act, notwithstanding his notice; for the act, by express words, made the fraudulent conveyance void, as to a purchaser; and forasmuch as it was within the express purview of the act, it ought to be taken and expounded in suppression of fraud. (*d*)

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(*a*) Cro. Eliz. 445.

(*b*) Colvile *v.* Parker, Cro. Jac. 158. [Cochran *v.* Paris, 11 Gratt. (Va.) 348; Gilmer *v.* Earnhardt, 1 Jones, Law, (N. C.) 559.] (*c*) Burrel's case, 6 Rep. 72.

(*d*) Gooch's case, 5 Rep. 60. (Sterry *v.* Arden, 1 Johns. Ch. 261, 268. Ricker *v.* Ham, 14 Mass. 137.) Cowp. R. 711.

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raised in other cases. And the title of the creditor to impeach the conveyance, may be rebutted by proof that the judgment was obtained by fraud, or that the claim on which it was founded was illegal and fraudulent. Alexander *v.* Gould, 1 Mass. 165; Clark *v.* Foxcroft, 6 Greenl. 296; 7 Greenl. 348, S. C.; Pierce *v.* Patridge, 3 Met. 44.

(†) [The purchase must be made *bonâ fide*, and not be merely colorable, for the purpose of avoiding the settlement. Doe *v.* James, 16 East, 212.]

14. One Bullock made a fraudulent estate of his land, within the statute 27 Eliz., and afterwards offered to sell it to Standen. Before assurance thereof, Standen had notice of the fraudulent conveyance, and, notwithstanding, proceeded and took his assurance of Bullock. It was agreed that Standen should avoid the fraudulent conveyance; for the notice of the purchaser could not make that good, which an act of Parliament made void as to him; and true it was, *quod non decipitur qui scit se decipi.* But in this case, the purchaser was not deceived; for the fraudulent conveyance, whereof he had notice, was void, as to him, by the said act, and therefore should not hurt him; nor was he, as to that, in any manner deceived. (*a*)

15. When the Judges were first called upon to expound these statutes, they appear to have considered *all voluntary conveyances*, that is, all conveyances not founded on a pecuniary or other valuable consideration, as fraudulent, and consequently *void against all existing creditors*,[1] as also against future ones. And it is the same, whether the debt was contracted by the person who makes the conveyance, or the person from whom he derives the estate. (*b*)

16. Thus, where A, having lands as heir to his father, covenanted, for natural love and affection, to stand seised to the use of himself for life, remainder to his first son in tail, &c.; he having notice at the time, of a bond entered into by his father to B;

(*a*) Standen *v.* Bullock, 5 Rep. 60. 2 Taunt. 82. (*b*) 1 Atk. 15.

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[1] The existence of indebtment at the time of the conveyance, is only *primâ facie* evidence of fraud. The question of fraudulent intent, which in these cases is an inference of fact, and not of law, depends on the amount which the grantor owed, his remaining estate and means of payment, and the other circumstances of the case, tending to impair the rights of creditors. To render the conveyance void against creditors, the grantor must be *largely* in debt, *alieno ære prægravatus, mole debiti prægravatus.* Inst. lib. 3, tit. 26, § 8; Dewey *v.* Bayntun, 6 East, 257; Shears *v.* Rogers, 3 B. & Ad. 363; Gale *v.* Williamson, 8 M. & W. 405; Lister *v.* Turner, 15 Law Journ. 336, N. S.; Jackson *v.* Seward, 8 Cowen, 406; Van Wyck *v.* Seward, 6 Paige, 62; Bracket *v.* Waite, 4 Verm. 389; Salmon *v.* Bennett, 1 Conn. R. 525; Howe *v.* Ward, 4 Greenl. 195; Huldnal *v.* Wilder, 4 McCord, 294. See also, 1 Story Eq. Jur. § 365; 2 Kent, Comm. 440—442, notes, 5th ed.

[If there be an existing debt, and the debtor makes a voluntary conveyance, and afterwards become insolvent, so that a creditor at the time loses his money, unless the property conveyed can be reached, such voluntary conveyance is presumed, as a matter of law, to be fraudulent. Black *v.* Sanders, 1 Jones, Law, (N. C.) 67.]

an action of debt was brought by B on this bond against A, as heir; and it was held that the conveyance by A was fraudulent and void against B, as much as a conveyance by the father, the original debtor, would have been. (*a*)

17. It appears, however, to have been soon established, that voluntary conveyances were *only void against creditors*, where the persons making such conveyances were *indebted at the* 427 * *time;* * and that all *voluntary conveyances* were *not void against future creditors*, but *only such as were also fraudulent.*[1] Thus, it is said in a note in Dyer, that if a man conveys land for the preferment of his children, this shall be good, if he was not in debt at the time; but if he was in debt, it would be otherwise. (*b*)

18. Lord Hardwicke has said, that it is necessary, on the statute 13 Eliz., to prove that the person making a settlement was indebted at the time, or immediately after the execution of the deed. And that, where a man has died indebted, who in his lifetime made a voluntary settlement, upon application to the Court of Chancery, to make it subject to his debts as real assets, the Court has always denied it, unless it was shown that he was indebted at the time the conveyance was executed. (*c*)

19. It was held by Lord Kenyon, when M. R., that a settlement after marriage, in favor of a wife and children, by a person not indebted at the time, was good against creditors, and not within the statute 13 Eliz. And in another case, it was declared by Lord Alvanley, when M. R., that to impeach a settlement, made after marriage, under the statute 13 Eliz., the husband must be proved to have been indebted at the time, to the extent of insolvency. (*d*)

20. Conveyances of this kind are, however, rendered void

(*a*) Apharry *v.* Bodingham, Cro. Eliz. 350. (*b*) Holcroft's case, Dyer, 294 b.
(*c*) 1 Atk. 93, 94. 2 Vez. 10. Jac. 552.
(*d*) Stephens *v.* Olive, 2 Bro. C. C. 90. Cro. Eliz. 810. Lush *v.* Wilkinson, 5 Ves. 384. 12 Ves. 147. Battersbee *v.* Farrington, 1 Swanst. 106. Shears *v.* Rogers, 3 B. & Ad. 362.

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[1] See Sexton *v.* Wheaton, 8 Wheat. 229, where the decisions on this point are reviewed by Marshall, C. J. See, also, Hinde *v.* Longworth, 11 Wheat. 199; Howe *v.* Ward, 4 Greenl. 195. See, also, the very able and learned judgment delivered by Chancellor Kent, in Reade *v.* Livingston, 3 Johns. Ch. 481; 2 Kent, Comm. 440–443; 1 Story, Eq. Jur. § 360–364. [A deed cannot be avoided by a subsequent creditor, except by proof of actual fraud. Johnston *v.* Zane, 11 Gratt. (Va.) 552.]

against commissioners of bankrupts, by the statute 1 Jac. I.; unless made upon the marriage of a child, being of the age of consent. (*a*)

21. *Voluntary conveyances* are in all cases *void against subsequent bonâ fide purchasers for valuable consideration;* for the subsequent conveyance to a purchaser sufficiently proves a fraudulent intent, in making the former conveyance.[1] And although it is said, in Bovey's case, that a voluntary conveyance was not, on that account, to be reckoned fraudulent, or to be avoided by a purchaser for a valuable consideration, and this doctrine has been frequently repeated; yet there is no case where a voluntary conveyance, though unattended with fraud, has been supported against a subsequent *bonâ fide* purchaser for a valuable consideration. But, on the contrary, such voluntary conveyances have always been deemed fraudulent and void, as against subsequent purchasers. (*b*)

22. The plaintiff's suit was to be relieved upon articles of agreement for the purchase of land from the defendant, Richard * Dean, who, before any conveyance in execution * 428 of the articles, had conveyed the premises by deed to the defendant, Roger Dean, his son. The Court, with the assistance of the Judges, declared that the said deed so made to Roger Dean, being a voluntary conveyance, and the said Richard Dean settling the premises to the plaintiff for valuable consideration, the said voluntary conveyance was a fraud. (*c*)

23. Settlements made upon a wife or children, after marriage, unsupported by any other consideration but that of love and affection, being only founded on a moral duty, are voluntary; and void under the statute 27 Eliz., as to subsequent purchasers for valuable consideration.

24. Thus, in the case of Colvile *v.* Parker, Justice Tanfield

(*a*) Walker *v.* Burrows, 1 Atk. 93.
(*b*) 1 Vent. 194. 2 Vez. 10. 3 Atk. 412. Tot. R. 158. Moo. 615.
(*c*) Leach *v.* Dean, 1 Rep. in Cha. 78.

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[1] In the United States, a prior voluntary conveyance is held good against a subsequent purchaser with notice. See *ante*, tit. 7, ch. 2, § 7, note; 4 Kent, Comm. 463; 1 Story, Eq. Jur. § 424–435. [To constitute a person a purchaser without notice, he must prove independently of the receipt on the deed, the payment of the consideration before he had notice of the existing claim. Coxe *v.* Sartwell, 21 Penn. (9 Harris,) 480.]

cited a case, in which it was adjudged, that where a person, after marriage, voluntarily assigned a lease for years, as a jointure for his wife; and afterwards sold it *to one who had not any notice* of this conveyance; it was within the statute. (*a*)

25. J. Reade being tenant for life, with remainder to his daughter Elizabeth in tail, they joined in levying a fine to trustees, in trust for the father for life, and after his decease, for the maintenance of Elizabeth and her children during the life of Elizabeth, and after her death and that of her husband, to raise portions for their younger children. Elizabeth survived her husband, and made a lease of the premises for twenty-one years, at a rack rent. Upon an attempt to annul this lease, by the daughter of Elizabeth, Lord C. J. De Grey delivered the opinion of the Court, that the deed was only a voluntary conveyance, within the true meaning of the statute 27 Eliz., being founded only upon a good, and not upon a valuable consideration; and therefore could not be set up against a *bonâ fide* purchaser. (*b*) (†)

26. *Although a purchaser has notice of a voluntary settlement, before he purchases, yet it will not affect him;* and he will be allowed to hold the estate against the person claiming under such voluntary settlement. (*c*)[1]

27. C. Evelyn, by a settlement after marriage, con-
429 * veyed the * premises in question to trustees, to the use of himself for life, remainder to trustees, to pay an annuity to his wife for her life, remainder to other trustees, to raise £4000 for younger children, remainder to his first and other sons in tail, with a proviso, that it should be lawful for C. Evelyn, by deed, to revoke the uses, and sell the estate; but he covenanted, that the money to be raised by the sale of the lands, should be paid to the trustees, to be by them laid out in the purchase of other lands, to be settled to the same uses. J. Templar purchased the

(*a*) Woodie's case, Cro. Jac. 158.
(*b*) Goodright *v.* Moses, 2 Black. R. 1019.
(*c*) Chapman *v.* Emery, *infra*.

[† A conveyance for payment of debts generally, to which no creditor is a party, nor any particular debts expressed, is a fraudulent conveyance within the above statute against a subsequent purchaser for a valuable consideration. (Leech *v.* Leech, 1 Cha. Ca. 249; Wallwyn *v.* Coutts, 3 Mer. 707; 3 Sim. 14; Garrard *v.* Lord Lauderdale, 3 Sim. 1,) and cannot be enforced by the creditor.]

[1] See *supra*, § 21, note.

settled estate of Evelyn, and paid the purchase-money to him. The children of Evelyn, claiming under the settlement, filed their bill against Templar, stating that he had notice of the settlement, and insisting that he ought to have paid the purchase-money to the trustees, not to Evelyn. The defendant contended that the settlement, being made after marriage, was voluntary, and fraudulent as to him; and claimed the benefit of the statute 27 Eliz. Lord Thurlow said, that although it would have been as well, at first, if voluntary conveyances had not been thought so little of, yet the rule was such, and so many estates stood upon it, that it could not be shaken; and dismissed the bill. (*a*)

28. J. Manning, by indenture dated in 1783, in consideration of love and affection for his mother, sisters, and brother, and for making a provision for them, conveyed the premises in question to trustees, to the use of himself for life, remainder to the use of his mother for life, &c. Two years after, J. Manning, in consideration of £1800, conveyed the premises to R. Otley in fee; and Otley had notice of the settlement of 1783, before payment of the purchase-money, and execution of the conveyance. (*b*)

The question was, whether this conveyance to Otley, who brought an ejectment for the recovery of the premises, was good against the prior settlement.

Lord Ellenborough delivered the judgment of the Court. He said, as it was found that there was no fraud in fact in the conveyance of 1783, the only point for the consideration of the Court was, whether a voluntary conveyance, without any valuable consideration, be not, according to the legal construction of the statute 27 Eliz., fraudulent against a subsequent purchaser for a valuable consideration; or, in other words, whether in such a case the law do not presume fraud, without admitting such *presumption to be contradicted. After stating all *430 the cases, his Lordship concluded in these words: "Thus stand the authorities on both sides of the question; and the weight, number, and uniformity of those which establish the point contended for, on behalf of the plaintiff, do, in our opin-

(*a*) Evelyn *v.* Templar, 2 Bro. C. C. 148. 2 Taunt, 82.
(*b*) Doe *v.* Manning, 9 East, 59. Cormick *v.* Trapaud, 6 Dow, 60.

ion, very much preponderate. And as many estates depend upon the rule, it ought not, we conceive, to be shaken. It appears from a manuscript note, formerly belonging to Mr. Justice Clive, that Mr. Horseman, in the year 1713, advised the making of a mortgage of the estate, settled in strict settlement by Sir R. Anderson after his marriage; thinking it voluntary and fraudulent, as against a purchaser. And the like advice as that which he gave nearly a century ago, probably had been given before; and that it has been given since, and acted upon, we cannot doubt; as Lord Thurlow was not likely to have expressed himself as he did in Evelyn *v.* Templar, (*a*) unless he had known that such had frequently been the case. Feeling ourselves pressed with these authorities and considerations, we think ourselves bound to give judgment for the plaintiff.

"Much property has no doubt been purchased, and many conveyances settled, upon the ground of its having been so repeatedly held that a voluntary conveyance is fraudulent, as such, within the statute 27 Eliz.; and it is no new thing for the Court to hold itself concluded, in matters respecting real property, by former decisions, upon questions in respect to which, if it were *res integra*, they probably would have come to very different conclusions. And if the adhering to such determinations is likely to be attended with inconvenience, it is a matter fit to be remedied by the legislature; which is able to prevent the mischief in future, and to obviate all the inconvenient consequences which are likely to result from it, as to purchases already made. And we cannot but say, as at present advised, and considering the construction put on the statute, that it would have been better if the statute had avoided conveyances only against purchasers for a valuable consideration, without notice of the prior conveyance."

29. With respect to the principles upon which Courts of Equity act, in cases of voluntary conveyances, Sir W. Grant, at the instance of a purchaser who entered into a contract with notice of voluntary settlement, enforced a specific performance of
431 * it * against the persons claiming under the settlement.

But in a subsequent case, where a vendor, who had made a voluntary settlement, filed a bill for a specific performance,

(*a*) *Ante*, s. 27.

against a person who had contracted for the purchase of the estate, and who at the date of the contract had not notice of the settlement, but subsequently obtained information of it; he refused to assist the vendor, upon the ground that the party, who made the settlement, had no right to disturb it, as against himself. (*a*)

30. By the fifth section of the stat. 27 Eliz., it is enacted, that if any person shall make any conveyance of lands, *with a clause of revocation*, at his will and pleasure, of such conveyance, and after such conveyance, shall bargain, sell, demise, grant, convey, or charge the same lands, to any person or persons, for money, or other good consideration, the said first conveyance not being revoked; that the said former conveyance, as against such bargainees, vendees, lessees, their heirs, successors, executors, administrators, and assigns, shall be void and of none effect.

31. It was resolved in Twyne's case, that if a man has a power of revocation, and afterwards, to the intent to defraud a purchaser, levies a fine, or makes a feoffment, by which he extinguishes his power, and then bargains and sells the land for a valuable consideration, the bargainee shall enjoy it; for as to him, the fine or feoffment, by which the condition was extinct, was void by the said act; and so the first clause, by which all fraudulent and covinous conveyances are made void, as to purchasers, extends to the last clause of the act, namely, when he who makes the bargain and sale had power of revocation. And it was said, that the stat. 27 Eliz. has made voluntary estates, with power of revocation, as to purchasers, in equal degree with conveyances made by fraud and covin, to defraud purchasers. (*b*)

32. A man conveyed lands to the use of himself for life, remainder to several persons of his blood, with a future power of revocation; and before the power began, he for a valuable consideration, bargained and sold the land to another and his heirs. It was adjudged, that this bargain and sale was within the remedy of the statute; of which the intent was, that all voluntary conveyances, which were originally subject to a power of revo-

(*a*) Buckle *v.* Mitchell, 18 Ves. 101. Smith *v.* Garland, 2 Mer. 123. See 3 Mer. 249. Johnson *v.* Legard, 3 Mad. 283.

(*b*) 3 Rep. 83 a. Cross *v.* Faustenditch, Cro. Jac. 180.

cation, whether present or future, should not stand against a purchaser for a valuable consideration. (*a*)

432 * * 33. A *power to mortgage* an estate to any extent is in effect a *power of revocation*, and will therefore render a deed void, as to a subsequent purchaser. But if no fraud be found, a *proviso to charge with a particular sum* is not within the statute. (*b*)

34. A *power to lease* all or any part of the lands, for any number of years, with or without any rent; being in effect a power of defeating the whole settlement, has been considered as a power of revocation. (*c*)

35. Where the power of revocation *can only be exercised with the consent of persons who are not under the control of the settlor*, the conveyance will not be considered as within the statute.

36. Sir John and Lady Maynard, in consideration of the marriage of their son, and of £5000 portion paid with his wife, covenanted to levy a fine of lands, which were the estate of Lady Maynard, to the use of Sir John for life, remainder to Lady M. for life, remainder to the son and his heirs; with a proviso, that it should be lawful for Sir John and Lady M., with the consent of four persons, to revoke the uses. After the death of Sir J., Lady M. entered and sold some of the lands without the consent of the trustees. It was resolved that the settlement was not fraudulent, within the stat. 27 Eliz., as it could not be made to deceive a purchaser; the power of revocation not being exercisable at the will and pleasure, (such are the words of the act,) of the settlor; but was restrained by the necessity of obtaining the consent of four persons, intrusted for the son's wife. Whereas, in the case mentioned in 3 Rep. 83 b, the consent seemed to be given by a person at the devotion of the settlor, and appointed by him. (*d*)

37. Where a deed contains a power of revocation, at the will and pleasure of the settlor, it is immaterial whether the consideration be a valuable, or only a good one; for it is equally void as to a subsequent purchaser. And in an opinion of Mr. Booth's, it is said,—"The reserving of powers of revocation to the grantors

(*a*) Standen *v.* Bullock, 3 Rep. 82 b. 4 Russ. 131.
(*b*) Tarback *v.* Marbury, 2 Vern. 511. Jenkins *v.* Keymis, 1 Lev. 152.
(*c*) Lavender *v.* Blackstone, 2 Lev. 146.
(*d*) Butler *v.* Waterhouse, 2 Show. 46. 2 Jones, 94.

or original owners of the land, though checked by requiring the consent of the trustees, hath of late been disused in settlements; because doubts have arisen whether such settlements are not fraudulent within the statute of 27 Eliz." And now powers of revocation, sale, and exchange, are always reserved to the trustees. (*a*)

*38. With respect to *the persons who are deemed subsequent purchasers*, within the stat. 27 Eliz., it was resolved *433 in Twyne's case, that no purchaser should avoid a precedent conveyance, made by fraud and covin, but he who was *a purchaser for money or other valuable consideration.* For although in the preamble it is said, "for money or other *good* consideration," and likewise in the body of the act, yet these words are to be intended only of valuable consideration; and this appeared by the clause respecting powers of revocation. For there it is said, for money or other good consideration, paid or given; where the word "*paid*" is referred to money, and "*given*" to good consideration, which excludes all considerations of nature or blood, or the like, and were to be intended only of valuable considerations, which might be given. (*b*)

39. A *mortgagee is a purchaser*, within the statute 27 Eliz., and may therefore avoid a prior voluntary conveyance, as fraudulent.[1]

(*a*) Collect. Jur. Vol. I. 426.

(*b*) 3 Rep. 83 a.

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[1] It has been questioned, whether a mortgagee, who takes a mortgage as security for a *preëxisting* debt, is a purchaser for a valuable consideration. In the case of bills of exchange, and promissory notes, it is well established that the person, who receives a bill or note as security for a precedent debt, is a holder for value, and is entitled to be protected as such, against any equities subsisting between the original parties, of which he had no notice. A few cases to the contrary may be found in the New York Reports; some of which turned on statutory provisions in that State, and the others have been shaken, if not overruled, by subsequent decisions. But the question was reëxamined and settled in favor of the holder, in Swift *v.* Tyson, 16 Pet. 1, 15–17, 20–22. And see Story on Bills, § 183, 192; Story on Promissory Notes, § 195 and note (1), where all the cases are collected. And see, accordingly, Allaire *v.* Hartshorne, 1 Zabr. 665. The same principle applies equally to a mortgagee; and seems so to have been recognized in Breckenridge *v.* Todd, 3 Monroe, R. 52, 55; 2 Story, Eq. Jur. § 1229; Hendricks *v.* Robinson, 2 Johns. Ch. 283, 304, 306; Smartle *v.* Williams, 3 Lev. 387; Mitford *v.* Mitford, 9 Ves. 100; Bayley *v.* Greenleaf, 7 Wheat. 56, 57.

But in the late case of Smith *v.* Babcock, 2 Woodb. & Minot, 246, 287, 288, decided while this work was in the press, it was held by Woodbury, J., that the note, trans-

40. R. Emery conveyed the premises in question, without any consideration, to the use of himself for life, remainder to his wife for life, remainder to their issue in tail. Three years after, Emery mortgaged the premises for £700 to a person who had notice of the settlement. In an ejectment, the question was, whether the mortgagee should avoid the settlement as fraudulent, under the stat. 27 Eliz. It was contended,—1. That the statute only related to purchasers, and that a mortgagee was not a purchaser. 2. That the mortgagee had notice; and no pretence or circumstance of fraud appeared. The settlement was three years prior to the mortgage; therefore could not have been made with a view to defeat it. (*a*)

Lord Mansfield said, there was no doubt but that a mortgagee was a purchaser. And as to the point of notice, that made no difference; because it was of a conveyance, made void by the statute.

41. A *lessee at a rack rent is a purchaser*, within the stat. 27 Eliz.; and in the case of Goodright *v.* Moses, this point was admitted. But in the case of Upton *v.* Bassett, it was held, that where a person made a lease, without receiving any fine, or reserving any rent, the lessee was not a purchaser within the statute 27 Eliz., and therefore could not avoid a preceding voluntary conveyance. (*b*)

434* *42. Where *the price is inadequate in a considerable degree*, or where an apparent inadequacy of price is coupled with *other circumstances, indicating a fraudulent collusion* between the purchaser and the vendor, to avoid a preceding conveyance; a purchaser under such circumstances will not be entitled to the protection of the statute. (*c*)

43. The consideration of an intended marriage is sufficient to establish a subsequent conveyance, and to render a previous

(*a*) Chapman *v.* Emery, Cowp. 279. (*b*) 1 Ab. Eq. *Ante*, s. 25. Cro. Eliz. 444.
(*c*) Twyne's case, 3 Rep. 83 b. Doe *v.* Routledge, Cowp. 705. *Supra*, s. 12, n. (a.)

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ferred to a creditor as collateral security for a preëxisting debt, is liable to all the equities which might be set up against it in the hands of the party by whom it was pledged; the learned Judge citing to this point, Jenness *v.* Bean, 10 N. Hamp. 266; Williams *v.* Little, 11 N. Hamp. 66; Coddington *v.* Bay, 20 Johns. 637; 6 Hill, N. Y. Rep. 93; Swift *v.* Tyson, 16 Pet. 1; Coolidge *v.* Payson, 2 Wheat. 66; Townsley *v.* Sumrall, 2 Pet. 170; 4 Hill, N. Y. Rep. 93; Neil *v.* Holbrook, 12 Pet. 84; *Ideo quære.*

voluntary one fraudulent and void, as against such second conveyance. But a settlement upon a wife after marriage, or upon children, will not avoid a preceding voluntary conveyance; unless it be made in pursuance of articles entered into before marriage (*a*)

44. The statutes 13 & 27 Eliz. only avoid voluntary conveyances as against *creditors*, and *subsequent purchasers;* and therefore the *persons making* voluntary or fraudulent and covinous conveyances, and all those claiming under them, are as much *bound by such conveyances*, as if these statutes had not been made.[1]

45. A made a voluntary conveyance to B, and afterwards a mortgage of the same lands; the first deed, on a trial at law, was found fraudulent; B exhibited his bill to redeem the mortgage. It was decreed, that though the deed to B was fraudulent, *quoad* the mortgage, yet it was good as to the equity of redemption, and would pass it; for a voluntary deed is good against the party that makes it, and his heirs. (*b*)

46. In the case of Leach *v.* Dean, the Court declared, that as to the voluntary conveyance, the same was not thereby impeached, as between the father and son, for any advancement, or any other thing thereby settled on the said son; other than making the said articles. (*c*)

47. A *voluntary deed cannot be defeated by a subsequent voluntary deed.* And it has been stated, that where there are two voluntary conveyances of the same land, the first will prevail. (*d*)

48. A made a voluntary settlement of lands in trust for his grandson and his heirs; some years after, he made another voluntary settlement of the same estate, to the use of his eldest son for life, remainder to his first and other sons in tail; and by will

(*a*) Douglass *v.* Ward, 1 Cha. Ca. 99. 1 Ab. Eq. 354. Martin *v.* Seamore, 1 Cha. Ca. 170.

(*b*) Rand *v.* Cartwright, Nels. 101. (*c*) *Ante*, s. 22. (*d*) *Ante*, c. 2, s. 58.

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[1] See, acc. Chapin *v.* Pease, 10 Conn. 69; Jackson *v.* Cadwell, 1 Cowen, 622; Sumner *v.* Murphy, 2 Hill, S. Car. R. 488; Reichart *v.* Castator, 5 Binn. 109; Worth *v.* Northam, 4 Ired. 102; Neely *v.* Wood, 10 Yerg. 486; Douglas *v.* Dunlap, 10 Ohio R. 162; Osborne *v.* Moss, 7 Johns. 161; Findley *v.* Cooley, 1 Blackf. 262; Hendricks *v.* Mount, 2 South. 738; Martin *v.* Martin, 1 Verm. 95; Drinkwater *v.* Drinkwater, 4 Mass. 354. [See also Walton *v.* Bonham, 24 Ala. 513; McClenny *v.* Floyd, 10 Texas, 159.]

gave a considerable estate to his grandson. It was proved
435* that * A always kept the first settlement in his custody,
and never published it, but it was found after his death amongst his waste papers; and the after deed was often mentioned by him, and he told the tenants that his eldest son was to be their landlord, after his death; yet the bill was dismissed, as to any relief against the first deed. The decree was affirmed in Parliament. (*a*)

49. A *voluntary settlement is also good as against a subsequent will*, because neither of them are founded on a valuable consideration.

50. A person who was *cestui que trust* of a term, by a little scrap of paper at an alehouse, but under hand and seal, settled the term on the plaintiffs, to pay his debts, and gave them the surplus. Afterwards, being dissatisfied with this settlement, which he had delivered to a creditor, he devised the term, by will in writing, to his half brother, subject to the payment of his debts. The question was, whether the deed or will should prevail. (*b*)

Lord Nottingham held, that there was no color for setting the deed aside to make way for the will; that if a man improvidently binds himself up by a voluntary deed, and does not reserve a liberty to himself, by a power of revocation, the Court of Chancery will not loose the fetters he has put upon himself, but he must lie down under his own folly. For if you would relieve in such a case, you must consequently establish this proposition, viz., that a man can make no voluntary disposition of his estate, but only by his will; which would be absurd.

51. In a subsequent case, where the question was, whether a will could have any effect to revoke a voluntary deed, made previous to it in time, and which was formal as to the execution, but very informal as to several parts of it, Lord Hardwicke said, here was a voluntary deed, without a power of revocation, not at all unfair, but only kept, and never cancelled. The will was no more than voluntary; and as there was no case where a voluntary settlement had been set aside by a subsequent will, this no longer remained a question. (*c*)

(*a*) Clavering *v.* Clavering, 2 Vern. 473. 1 Ab. Eq. 24. Croker *v.* Martin, 1 Dow & Clar. 15.

(*b*) Villiers *v.* Beaumont, 1 Vern. 100.

(*c*) Boughton *v.* Boughton, 1 Atk. 625. Bolton *v.* Bolton, 3 Swanst. 414, n.

52. [In Sear *v.* Ashwell, Lord Hardwicke decided, that a voluntary deed in favor of younger children, though retained in the possession of the grantor, and afterwards destroyed by him upon his second marriage, should be established as against legatees. (*a*)

*53. In Carey *v.* Stafford, a voluntary conveyance of lands, not the property of the grantor, was established against him, as an agreement to settle lands upon the grantee, of equal value.] (*b*) *436

54. There is a proviso in the stat. 13 Eliz., s. 6, that it shall not extend to any estate or interest in lands, made upon good consideration; and *bonâ fide* lawfully conveyed or assured to any person, not having at the time of such conveyance any notice of such covin, fraud, or collusion, as is aforesaid. And in the stat. 27 Eliz. there is also a proviso, (s. 4,) that it shall not extend to make void any conveyance, assignment of lease, assurance, grant, charge, lease, estate, or interest in any lands, &c., made upon good consideration, *bonâ fide*, to any person or persons, bodies politic or corporate.

55. In consequence of these provisions, deeds, *made for a peculiar consideration*, or in consequence of any *stipulations which are beneficial and valuable*, are not within these acts, and cannot be impeached, either by creditors or subsequent purchasers.

56. John Hammerton, being seised in fee of an estate charged with an annuity of £50 to his mother, and having two brothers, and being about to be married, prevailed on his mother to relinquish her security upon the whole estate, and take a security upon part; a settlement was made accordingly, by which the estate was limited to John for life, remainder to his first and other sons by that marriage in tail male, remainder to the next brother in tail male, remainder over. And the question was, whether the remainder to the next brother of John was voluntary. The Court held, that it was not voluntary; because the mother must be presumed to have stipulated for the limitation to her second son, as the price of her relinquishing her security upon the whole estate, and taking a new security upon part. (*c*)

57. *Marriage* being considered as a *valuable consideration*, deeds made previous to, and in consideration of an intended

(*a*) 3 Swanst. 411, in notes.
(*b*) 3 Swanst. 427, in notes.
(*c*) Roe *v.* Mitton, 2 Wils. R. 356.

marriage, have been always held good within these provisoes, and not impeachable by creditors, or subsequent purchasers. (*a*) [1]

58. A person having an estate in reversion in a copyhold, surrendered it to his eldest son in tail, in order that his son, coming in as a purchaser, should pay a smaller fine. Afterwards the father, on a treaty of marriage between his son and B., told B.'s friends that this copyhold was so settled; and the mar-
437 * riage * was had, and a portion of £2000 paid with B. Some time after, the father settled the copyhold on a second wife. (*b*)

Lord Cowper decreed, that the surrender to the son was good; for although it was at first voluntary, yet, upon the treaty of the marriage, it was a principal inducement, therefore became valuable; and ought to be considered as if it had then been surrendered to the son.

59. Though a *settlement be executed after marriage*, yet if it is made in pursuance of an agreement entered into before marriage,† or in consideration of an additional portion, it will be as good as if made before marriage. (*c*) [2]

60. The defendant's father, some time after marriage, in consideration of an additional portion of £100 paid by his wife's mother, settled an estate of £100 a year on himself for life, remainder to his first and other sons, &c.: and the mother of the defendant's father having an interest in the estate, joined with him in the conveyance. Thirteen years after, the father mortgaged the estate to the plaintiff, with the usual covenants, and died. (*d*)

Lord Talbot said, the question was, whether this was a volun-

(*a*) Plowd. 58. Bovy's case, 1 Vent. 193.
(*b*) Kirk *v.* Clark, Prec. in Cha. 275.
(*c*) 1 Ab. Eq. 354. Dundas *v.* Dutens, 2 Cox. 235.
(*d*) Jones *v.* Marsh, Forrest, 63.

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[1] [A contract by husband and wife, before marriage, that she should enjoy her separate property without interference on the part of the husband, without trustees, is only an agreement to make a marriage settlement, and will not at law exempt the yearly products of her land from an execution against him. Bond *v.* Thompson, 26 Vt. (3 Deane,) 741. See Rivers *v.* Thayer, 7 Rich. Eq. (S. C.) 136.]

[2] [A postnuptial settlement, reciting an antenuptial parol contract, is not valid as against creditors. Albert *v.* Winn, 5 Md. 66.]

[† But it seems that a mere recital in a postnuptial settlement is not evidence against creditors of articles before marriage. Battersbee *v.* Farrington, 1 Swanst. 106, 113.]

tary conveyance or not. And it would be very hard to call this a fraudulent settlement, since it was in consideration of a marriage had, and of an additional portion paid by the wife's relations, which could not be called voluntary against a mortgage made thirteen years after.

61. R. Williams made a settlement in consideration of a marriage already had, and of a portion of £1000 paid to him by his wife's brother: the husband became a bankrupt, and the question was, whether this settlement was good against his creditors. (*a*)

Lord Hardwicke said, it was admitted, if a settlement was made before marriage, though without a portion, it was good; for marriage itself was a consideration. And it was equally good, if made after marriage, provided it was upon payment of money, as a portion, or an additional sum of money, or even an agreement to pay money, if the money was afterwards paid, pursuant to the agreement. This was allowed, both in law and * equity, to be sufficient to make it a good and * 438 valuable settlement. Decreed a good settlement against the creditors. (*b*)

62. In a subsequent case, Lord Hardwicke said, that a settlement, though made after marriage, not being in consideration of a portion which, for any thing that appeared, was paid at the time, could not be impeached by subsequent creditors. (*c*)

63. Where a *wife joins with her husband in destroying the settlement* made on her marriage, and *a new settlement is made*, it will be good; though a better provision is given to the wife and children than was contained in the original settlement.

64. Sir R. Bell, on his marriage, settled certain lands on himself for life, remainder to his wife for her jointure, remainder to the first and other sons of the marriage, &c. Sir R. Bell, having afterwards contracted debts, and there being no issue, his wife joined him in a fine of the settled estates, and they were sold. Sir R. B. covenanted to stand seised of other estates to the same uses as those contained in the settlement. It was resolved by Lord Hale and the other Judges, that the second settlement was good, and valid against subsequent creditors; for the old settle-

(*a*) Brown *v.* Jones, 1 Atk. 188. (*b*) Spurgeon *v.* Collier, 1 Eden, 55.
(*c*) Stileman *v.* Ashdown, 2 Atk. 477. Ramsden *v.* Hylton, 2 Vez. 304.

ment being destroyed, and the new one made the same day, an agreement by the husband to make the new settlement, in consideration of the wife's having joined in the fine to destroy the old settlement, would be presumed. And this consideration should extend to all the limitations in the new settlement; although the estates comprised in the new settlement were nearly double the value of those contained in the old one. (*a*)

65. Lord Kenyon, when Master of the Rolls, held that where a husband, after marriage, conveyed an estate to trustees, for the separate use of his wife; the covenants by the trustees to indemnify the husband against the debts which his wife might contract after the separation, was a valuable consideration; and therefore, that the settlement, though made after the debt due to the plaintiff was contracted, was good against him. (*b*)

66. It was determined in the following case, that a settlement, made before marriage, in consideration of such marriage, and of a marriage portion, by a person who was indebted at the time, was good against creditors.

67. Lord Montfort, by a settlement made before his marriage, in consideration of such marriage, conveyed a real estate
439 * and * assigned over all his household goods to trustees, in strict settlement. It was proved that, at the time of the settlement, it was known that Lord Montfort was in debt; but he thought the fortune of the lady he was to marry, which amounted to £10,000, was amply sufficient to pay all the debts he owed at that time; and had no idea of disappointing any creditor. Kennet, who was a judgment creditor of Lord Montfort, at the time of his marriage, took those goods in execution; and the trustees in the settlement brought an action of trover against him for them. (*c*)

Lord Mansfield.—"The question in this case is, whether the plaintiffs, who are trustees under the marriage settlement of Lord Montfort, by which the household goods in question are settled as heirlooms, with the house, in strict settlement, and specifically enumerated in a schedule annexed to the settlement, so as to avoid any fraud by the addition or purchase of new, are

(*a*) Scot *v.* Bell, 2 Lev. 70.

(*b*) Stephens *v.* Olive, 2 Bro. C. C. 90. Westmeath *v.* Westmeath, 1 Jac. 126. Elworthy *v.* Bird. 2 Sim. & Stu. 372.

(*c*) Cadogan *v.* Kennet, Cowp. 432.

entitled to the possession of these goods against the defendant Kennet.

"The defendant has taken the goods in execution, and it is not disputed that he is a fair creditor; but the plaintiffs bring this action as trustees under the marriage settlement; and the question is whether they are, against the defendant, entitled to the possession of these goods, for the purpose of the trust.

"I have thought much of this case, since the trial, and in every light in which I have considered it, I have not been able to raise a doubt.

"The principles and rules of the common law, as now universally known and understood, are so strong against fraud, in every shape, that the common law would have attained every end proposed by the statutes 13 Eliz., c. 5, and 27 Eliz., c. 4. The former of these statutes relates to creditors only, the latter to purchasers. These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud.

"The statute 13 Eliz., c. 5, which relates to creditors, directs that no act whatsoever, done to defraud a creditor or creditors, shall be of any effect against such creditor or creditors; but then such a construction is not to be made, in support of creditors, as will make third persons sufferers. Therefore the statute doth not militate against any transaction *bonâ fide*, and where there is no imagination of fraud; and so is the common law. But *if the transaction be not bonâ fide*, the circumstance of its *being done for *a valuable consideration will not alone* *take it out of the statute.* I have known several cases, where persons have given a fair and full price for goods, and when the possession was actually changed, yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void. One case was where there had been a decree in the Court of Chancery, and a sequestration; a person, with knowledge of the decree, bought the house and goods of the defendant, and gave a full price for them. The Court said, that the purchase, being with a manifest view to defeat the creditor, was fraudulent; and therefore, notwithstanding a valuable consideration, void. So, if a man knows of a judgment and execution, and with a view to defeat it, purchases the debtor's goods, it is void, because the purpose is iniquitous; it is

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assisting one man to cheat another, which the law will never allow. There are many things which are considered as circumstances of fraud. The statute says not a word of possession; but the law says, if, after a sale of goods, the vendor continue in possession, and appear as the visible owner, it is evidence of fraud, because goods pass by delivery; but it is not so in the case of a lease, because that does not pass by delivery.

"The statute 13 Eliz., c. 5, does not go to voluntary conveyances, merely as being voluntary, but to such as are fraudulent. A fair voluntary conveyance may be good against creditors, notwithstanding its being voluntary. The circumstance of a man's being indebted, at the time of making a voluntary conveyance, is an argument of fraud. The question, therefore, in every case is, whether the act done is a *bonâ fide* transaction, or whether it is a trick and contrivance to defeat creditors. If there be a conveyance to a trustee for the benefit of the debtor, it is fraudulent. The question then is, whether this settlement is of that sort. It is a settlement which is very common in great families. In wills of great estates, nothing is so frequent as devises of part of the personal estate, to go as heirlooms. For instance, the devise of the Duke of Bridgewater's library; the old Duke of Newcastle's plate; so in marriage settlements, it is very common for libraries and plate to be thus settled; and for chattels and leases to go along with the land. If the husband grows extravagant, there never was an idea that these could be afterwards overturned. If this Court were to determine that they should,
441 * * the parties would resort to Chancery. We come, then, to the circumstances of the present case, which are very strong. There is not a suggestion of any intention to defraud, or the most distant view of disappointing any creditor. The very object of the marriage settlement was, that the lady's fortune might be applied to discharge all Lord Montfort's debts; the amount of this fortune was £10,000, and was thought fully sufficient for that purpose. Besides, this is a settlement approved by a Master in Chancery. Most clearly the Master in Chancery and the Great Seal could have no fraudulent view; but it appears further that the reason why the goods were inserted, was because the settlement of the real estate alone was deemed inadequate without them; clearly, therefore, it was no contrivance to

defeat creditors, but meant as a provision for the lady, if she survived, and heirlooms for the son. (*a*)

"An argument, however, is drawn from the possession, as a strong circumstance of fraud; but it does not hold in this case. It is a part of the trust that the goods shall continue in the house, and for a very obvious reason,—because the furniture of one house will not suit another; and it was the business of the trustees to see the goods were not removed. If Lord Montfort had let his house with the furniture, or if the rent could be apportioned, the creditors would be entitled to the rent; but they have no right to take the goods themselves; the possession of them belongs to the trustees, and the absolute property of them is now vested in the eldest son.

"I expected an authority; but though such settlements are frequent, no case has been cited to show they are fraudulent. How common are settlements of chattels, and money in the stocks! Can there be a doubt but they are good? yet the creditors would be entitled to the dividends, during the interest of the debtor. Here there was clearly no intention to defraud, and there is a good consideration. Therefore, I am of opinion, it could not be left to a jury to find the settlement fraudulent, merely because there were creditors. The goods must now be kept in the house, for the benefit of the son." †

*68. In the case of settlements made before marriage, *442 there has been a considerable difference of opinion re-

(*a*) *Ante*, s. 18.

[† In Lady Arundell *v.* Phipps, (10 Ves. 139,) the question was, whether the purchase by a married woman from her husband, through the medium of trustees, for her separate use, could be sustained against creditors, if *bonâ fide*, though the husband was indebted at the time, and though the object was to preserve from his creditors the subject of the purchase. The husband continued in possession. Lord Eldon was of opinion that it might. The order was, that it should be admitted that the sheriff returned *nulla bona*. An action had been brought in C. P., and the jury found that, under all the circumstances, the deed was fraudulent; a rule *nisi* was obtained for setting aside the verdict, and for a new trial, and the cause came on upon a subsequent day. The rule was made absolute. Dewey *v.* Bayntun, 6 East, 257. The finding of the jury was not to the satisfaction of Lord Eldon, (see 1 Rop. H. & W. 325, ed. 1,) who directed a subsequent issue, which, it is stated by Mr. Roper, was prevented by compromise. Upon this subject, see further, Wardell *v.* Smith, 1 Campb. N. P. 332; Leonard *v.* Baker, 1 M. & Sel. 252; Muller *v.* Moss, Ib. 335; Latimer *v.* Batson, 4 B. & Cress. 655; Jezeph *v.* Ingram, 8 Taunt. 843.]

specting *the extent to which the consideration of marriage ought to be carried;* it being settled, that a deed may be fraudulent as to one person, and good as to another. In *some cases* it has been held, that the consideration of marriage extends, not only to the estates limited to the husband and wife, and their issue, but also *to the estates limited to any branch of the husband's family.*

69. Thus, where a person, in consideration of the marriage of his son, and of £2000 marriage portion, settled the premises to the use of himself for life, remainder to his son and the heirs of his body by that marriage, remainder to the heirs of the body of his son by any other wife; it was contended that this last limitation, not being within the consideration of the marriage settlement, was voluntary, and therefore void against subsequent purchasers. But Lord Hale said, that the consideration of the marriage and marriage portion, would run through all the estates raised by the settlement, though the marriage was not concerned in them, so as to make them good against purchasers, and to avoid a voluntary conveyance. (*a*)

70. So where a person covenanted, in consideration of the marriage of his eldest son, and a marriage portion, to settle lands on him in tail, remainder to his second son; it was held, that the consideration extended to the second son; and therefore that the settlement was not fraudulent against creditors. (*b*)

71. On the other hand there are *several cases* where the consideration of marriage has been *allowed to extend only to the immediate objects of the settlement,* and not to any remote ones. Thus, it is said by Lord Macclesfield, in 10 Mod. 534, that where

443 * * there is a marriage portion and settlement, that part of the settlement only which belongs to the wife, and children by that wife, can be esteemed to be founded upon the consideration of that marriage; for it was absurd to imagine that the friends of the wife should be supposed at all concerned about the remote uses of the settlement, upon persons to whom they were entire strangers. And as for the case of Jenkins *v.* Kemishe, it ought not to be understood in so absurd a sense as that came to: the meaning of the case was no more than this; that a father, where he makes a marriage settlement upon one son, has such a fair and justifiable opportunity offered

(*a*) Jenkins *v.* Kemishe, Hard. 895.

(*b*) White *v.* Stringer, 2 Lev. 105. Osgood *v.* Strode, 2 P. Wms. 245.

him of providing for his other children, as that if he thinks fit to lay hold upon and embrace it, by inserting in the settlement provisions for them, such provisions shall never be deemed fraudulent, and as such set aside in favor of creditors. (*a*)

72. In another case, Lord King has said, that where a settlement was made by the father, or other lineal ancestor, in consideration of the marriage of his son, in such case all the remainders, limited to his children and their posterity, were within the consideration of the settlement. But where it was made by a brother, or other collateral ancestor, on his marriage, there, after the limitations to his own issue, all the remainders limited to his collateral kindred were voluntary, and not within the consideration of the marriage settlement. (*b*)

73. In a modern case, the Judges of the Court of King's Bench certified their opinion, that a limitation in a marriage settlement to the issue of the settlor, by a second marriage, was not voluntary; and in a subsequent case, the same Judges certified their opinion, that a limitation in a marriage settlement to the brothers of the settlor, was voluntary. (*c*)

74. There is one case in which a conveyance, founded on a *moral consideration only*, has been held good against a subsequent purchaser; namely, that of *a widow making a settlement on her children by her first husband*, previous to her marrying a second.

75. Thus, where a widow, who had two children, by articles, previous to her second marriage, with the consent of her intended husband, settled her estate upon her two children; the husband and wife afterwards mortgaged the estate to a person who had notice of the settlement. (*d*)

Lord Hardwicke said, the question was, whether the articles *were for a valuable consideration, and binding, *444 or ought to be considered as voluntary and fraudulent, with respect to subsequent creditors, or purchasers. And if he was to lay it down as a rule, that such articles were not binding, it would become impossible for a widow, on her second marriage,

(*a*) Ball *v.* Burnford, Prec. in Cha. 113. Staplehill *v.* Bully, Id. 224. 2 P. Wms. 249. *Ante*, s. 69.

(*b*) Reeves *v.* Reeves, 9 Mod. 132. 18 Ves. 92.

(*c*) Clayton *v.* Earl of Winton, 8 Mad. R. 302, n. See also, Sug. V. & P. c. 16, s. 3. Johnson *v.* Legard, Id. 283. S. C. 1 Turn. & Russ. 281.

(*d*) Newstead *v.* Series, 1 Atk. 265.

to make any certain provision for the issue of a former; and the second husband might then contrive to defeat the provision made for those children. He therefore decreed, that the articles ought not to be considered as voluntary; for there were reciprocal considerations, both on the part of the husband and the wife, and the mortgagee had notice of the articles.

NOTE. The student will doubtless by this time have perceived, that, in the law of real property, there are many rules, apparently arbitrary and technical, whose origin is either lost in the obscurity of remote ages, or may be traced to systems now obsolete, or to reasons, once good, but no longer existing. It may seem, to a superficial observer, that where the reason has ceased, the rule ought also to cease; and that its continuance is a blemish upon the code in which it is found. But in truth these rules are so incorporated into the body of law, that, like petrifactions in marble, or flies in amber, their removal would only serve to mar and deface the material of which they have become a part. They are landmarks of the law, and muniments of title; rules by which the entire body of real estate has been transmitted, and is still in the continual process of transmission; and their certainty and stability are of vastly more consequence than is their consistency with this or that theory, or even with reason. They may be changed, prospectively, by the legislature; though changes of this kind, except to remove evils, actually existing and felt, are always of doubtful expediency, if not positively mischievous; but Judges cannot dispense with these rules, except by declaring them no longer to be parts of the law of the land. And if they are now obsolete, when did they become so? Or who can tell the moment, when any one of them ceased to govern or to affect the steady current of transmission of real estate?

It is for such reasons that Judges have deemed themselves bound to adhere to the rules of the law of real property, with a closeness sometimes seeming to border on servility, but in truth dictated by sound wisdom. *Omnis innovatio plus novitate perturbat, quam utilitate prodest.* And, *Misera servitus est, ubi jus vagum aut incertum.* Broom, Leg. Max. 61, 62. Hence the remark of Parker, C. J., in Goodright *v.* Wright, 1 P. Wms. 399, that "the altering settled rules concerning *property*, is the most dangerous way of removing landmarks." And Ld. Chancellor Macclesfield, in Wagstaff *v.* Wagstaff, 2 P. Wms. 258, said that "his opinion was, never to shake any settled resolutions touching *property*, or the title of land; it being for the common good that these should be certain and known, however ill grounded the first resolution might be." The same view was taken by Mr. Justice Wilmot, in Robinson *v.* Bland, 1 W. Bl. 264. "Where an error," said he, "is established and has taken root, upon which any *rule of property* depends, it ought to be adhered to by the Judges, till the legislature think proper to alter it; lest the new determination should have a retrospect, and shake many questions already settled." So Ld. Mansfield said, in Rice *v.* Shute, 2 W. Bl. 696, that "there is no mischief that attends setting aside rules of practice, when erroneous; though in rules of *property* it is otherwise." And again, in Hodgdon *v.* Ambrose, 1 Doug. 341, he observed, that, "The great object, in questions of *property*, is certainty; and if an erroneous or hasty determination has got into practice, there is more benefit derived from adhering to it, than if it were to be overturned." So, Lord Camden, in Morecock *v.* Dickens, Ambl. 678, speaking of the English rule, that registration of a deed was not notice of its contents, said, that if it were a new case, he should have his doubts; but that the point was settled by a previous decision, and much property had been settled and

conveyances made upon the strength of it. "A thousand neglects to search," added he, "have been occasioned by that determination; and therefore I cannot take upon me to alter it." Lord Ellenborough expressed a similar opinion, in Doe *v.* Manning, 9 East, 71. "It is no new thing," he remarked, "for the Court to hold itself concluded, in matters of *real property*, by former decisions, upon questions, in respect of which, if it were *res integra*, they probably would have come to very different conclusions. And if the adhering to such determinations is likely to be attended with inconvenience, it is a matter fit to be remedied by the legislature."

These opinions of eminent Judges, noted in the course of my earliest studies, may suffice for the student's use; impressively teaching the importance of respecting and preserving the rules of property, however those of the ever varying relations of persons and of commerce may safely be dealt with. It was a weighty observation of the venerable Chancellor Kent, that—"Technical and artificial rules, of long standing, and hoary with age, conduce exceedingly to certainty and fixedness in the law; and are infinitely preferable, on that account, to rules subject to be bent every day by loose latitudinary reasoning." 4 Kent, Comm. p. 8, note.

"The way of ancient ordinance, though it winds,
Is yet no devious way. Straightforward goes
The lightning's path, and straight the fearful path
Of the cannon ball. Direct it flies, and rapid,
Shattering, that it may reach, and shattering what it reaches.
My son! the road the human being travels,
That on which *blessing* comes and goes, doth follow
The river's course, the valley's playful windings,
Curves round the corn-field, and the hill of vines,
Honoring the holy bounds of property!
And thus secure, though late, leads to its end."

CHAP. XXIX.

OF REGISTERING AND ENROLLING DEEDS.[1]

SECT. 2. *Register Acts.*
11. *An Appointment must be registered.*
13. *Registering an Assignment is not registering a Lease.*
15. *Registering is not Notice.*
SECT. 20. *Notice takes away the Effect of registering.*
25. *The Notice must be fully proved.*
28. *Utility of the Register Acts.*
31. *Enrolment of Deeds.*

SECTION 1. By the *common law*, every deed took place according to the *priority of its date or delivery*; in consequence of

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[1] In all the American States, where the conveyance of real estate, or any interest therein, is made by deed poll, or by deed *inter partes*, provision is made by statute for the registration of the instrument of conveyance. And in all the States, provision is made for the acknowledgment of the deed by the grantor, before some magistrate or other person or officer designated by law, or for the solemn proof of its execution, either by the subscribing witnesses, or in case of their death or absence, then by other witnesses, before it is admitted to registration. This acknowledgment or proof is to be written or indorsed upon the deed.

In many States it is enacted that the deed, thus authenticated and registered, may be read in evidence, without further proof of its execution; but the evidence is not conclusive. But in the Courts of many other States, the proof required by the common law is still demanded. (See *New York*, Rev. Stat. Vol. II. p. 43, § 19, 3d ed.; *New Jersey*, Rev. St. 1846, tit. 22, ch. 5, § 1; *Pennsylvania*, Dunlop, Dig. p. 62, 63, 2d ed.; *North Carolina*, Rev. St. 1837, Vol. I. ch. 37, § 1, 2, 6, p. 225, 226; *Georgia*, Rev. St. 1845, ch. 15, § 59, p. 417; *Alabama*, Toulm. Dig. p. 334; *Illinois*, Rev. St. 1839, p. 158, § 17; *Mississippi*, Rev. St. 1840, p. 343, § 1; *Missouri*, Rev. St. 1845, p. 227, § 45; 1 Greenl. Ev. § 573, note.

In all the States, the timely and due registration of a deed, duly executed and acknowledged or proved, is at least constructive notice, to all the world, of the conveyance. See *infra*, § 20, note. Some of the States have prescribed a time, within which deeds shall be registered; and if so registered, it is understood that they take effect from the time of their execution and delivery. In some statutes it is so expressed. Thus, in *Pennsylvania* and *Ohio*, the time limited is six months; in *Delaware*, it is one year; in *Virginia* it is eight months; in *North Carolina*, it is two years; in *South Carolina*, it is six months, if the grantor was resident in the State at the time of execution of the deed, twelve months if he resided in any other of the United States, and two

which, purchasers and mortgagees were frequently defrauded, by means of prior conveyances, with which they were unacquainted.

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years, if in a foreign country. In *Kentucky*, it is eight months; but if the grantor is a resident of any other of the United States, it is eighteen months; and two years if in a foreign country. In *Indiana*, it is ninety days; and in *Mississippi* and *Alabama*, it is three months. In all these cases, deeds may be recorded after the time specified; but in that case they are valid against creditors and subsequent purchasers without notice, only from and after the time of recording, and not from and after their execution.

Mortgages must be recorded, in *Kentucky* and *Pennsylvania*, in sixty days, and in *North Carolina*, in six months, after their execution; in which cases, it is presumed, they take effect from their execution, wherever other deeds take such effect. But in *Pennsylvania*, mortgages, not recorded within the time specified, take effect only from the time of their registration. And in *Delaware*, *Virginia*, *Ohio*, and *Mississippi*, though a time is limited for the registration of all other deeds, it is expressly provided that mortgages become a lien only from the time of their registration.

In several of the States, provision is made by law for giving constructive notice of a conveyance, prior to its registration, in cases where the grantor refuses to acknowledge the deed, or is dead, or out of the State, so that it must be authenticated in some other manner, by proof, by the subscribing witnesses, or by the testimony of others. In *New Hampshire* and *Vermont*, the deed, in such case, may be provisionally registered, which shall avail, to all intents, as a regular registration, for the space of sixty days; and in the latter State, for the further space of six days after the termination of any legal proceedings which may then be pending for proving the execution of the deed. In other States, the same effect is given to the filing of a copy of the deed in the Registry of Deeds. The copy thus filed, is made available instead of registration, as a sufficient caution for forty days from the time of filing. In *Massachusetts*, for thirty days, and until seven days after the termination of any proceedings then pending for proof or acknowledgment of the deed. In *Rhode Island*, if the grantor refuse to acknowledge the deed, he may be committed to prison by a magistrate, with the right of appeal to the Supreme Judicial Court; in which case a copy of the deed, filed in the Registry, is available during the pendency of the appeal. In *Connecticut*, in the like case, the filing of a copy of the deed is made to serve "until a legal trial has been had." In *Michigan*, if the deed is not acknowledged, a copy, filed in the Registry, is a sufficient registration for thirty days, if proceedings for proof of the deed are taken before a Justice of the Peace, and for seven days after the termination of such proceedings; and for ten days after the first day of the term, if the proceedings are had in a Court of Record. In *Indiana*, in such cases, the filing of a copy is a sufficient caution for thirty days, if the original deed is proved and filed within that period.

Deeds not recorded, are in all cases understood to be valid between the parties and their heirs, and available to the grantee, at least by way of estoppel; and are good against all others, except creditors and subsequent *bonâ fide* purchasers without notice. And a deed is registered, in contemplation of law, when it is entitled to registration, and is deposited with the Register, in his office, for that purpose.

See N. Hamp. Rev. St. 1842, ch. 180, § 7; Maine, Rev. St. 1840, ch. 91, § 20; Mass. Rev. St. 1836, ch. 59, § 19, 20; Verm. Rev. St. 1839, ch. 60, § 16, 17; Conn. Rev. St. 1849, tit. 29, ch. 1, § 12; R. Island, Rev. St. 1844, p. 258, § 4; Mich. Rev. St. 1846, ch. 65, § 21, 22; Ind. Rev. St. ch. 28, § 25, 26, 34; Pa. Dunlop's Dig. ch. 61, p. 116, 117,

2. To remedy this inconvenience, in certain parts of the kingdom, several acts of Parliament have been made, called the Register Acts. The first of these is the statute 2 & 3 Ann. c. 4, by which it is enacted, "That a memorial of all deeds and conveyances which, after the 29th day of September, 1704, shall be made and executed, of or concerning, and whereby any honors, manors, lands, tenements, or hereditaments, in *the West Riding of the county of York*, may be any way affected, in law or equity, may, at the election of the party or parties concerned, be registered. And that every such deed or conveyance, that shall at any time after the said day be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser, or mortgagee, for valuable consideration, unless such memorial thereof shall be registered, as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim."

3. By the 7th section it is enacted, "That all and every 446* *memorial, so to be entered or registered, shall be put into writing in vellum, or parchment, and directed to the register of the said office; and in case of deeds and conveyances, shall be under the hand and seal of some or one of the grantors, or some or one of the grantees, his or their guardians or trustees, attested by two witnesses, one whereof to be one of the witnesses to the execution of the deed or conveyance mentioned in such memorial."

4. By the 8th section, it is further enacted, "That every memorial of any deed or conveyance shall contain the day of the month and the year when such deed or conveyance bears date, and the names and additions of all the parties to such deed or conveyance, and of all the witnesses to such deed or conveyance,

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354; Del. Rev. St. 1829, p. 90, 91; Virg. Tate's Dig. p. 173; N. Car. Rev. St. 1837, p. 224, 231; S. Car. St. at Large, Vol. VII. p. 233; Ohio, Rev. St. 1841, ch. 37, § 8; Kentucky, Rev. St. 1834, Vol. I. p. 432, 433, 438, 448, 452; Mississippi, Rev. St. 1840, ch. 34, § 5; Ala. Toulm. Dig. p. 245, 246; but see Thornton's Conv. p. 77.

See also, 4 Kent, Comm. 457–459; *supra*, ch. 9, § 34, note; *ante*, tit. 15, ch. 5, § 1, 50, notes; 3 Phil. on Evid. p. 1243, cases collected in note 874, by Cowen & Hill. The registration of an instrument, not properly authenticated as the law requires, or not directed or authorized by law to be registered, is of no avail. Kerns *v.* Swope, 2 Watts, 75; Cheney *v.* Watkins, 1 H. & J. 527; De Witt *v.* Moulton, 5 Shepl. 418; Heister *v.* Fortner, 2 Binn. 40; [see *post*, § 20, note.]

and the places of their abode, and shall express or mention the honors, manors, lands, tenements, and hereditaments contained in such deed or conveyance, and the names of all the parishes, townships, hamlets, precincts, or extra-parochial places, within the said west riding, wherein any such honors, &c., are lying or being, that are given, granted, conveyed or any way affected or charged, by any such deed or conveyance, in such manner as the same are expressed or mentioned in such deed or conveyance, or to the same effect. And that every such deed or conveyance, of which such memorial is so to be registered as aforesaid, shall be produced to the said register, or his deputy, at the time of entering such memorial, who shall indorse a certificate on every such deed or conveyance, and therein mention the certain day, hour, and time, on which such memorial is so entered and registered, expressing also in what book, page, and number the same is entered; and that the said register, or his deputy, shall sign the said certificate, when so indorsed.

5. By the 16th section, it is provided, that this act shall not extend to any copyhold estates, or to any leases at a rack rent, or to any lease not exceeding twenty-one years, where the actual possession and occupation goeth along with the lease.

6. By the stat. 6 Ann. c. 35, similar regulations are made for registering all deeds and conveyances that may affect any honors, manors, &c., in the *East Riding of the county of York*, or the *town and county of York*, or the *town and county of the town of Kingston-upon-Hull*, with the same exception of copyholds and leases; and by the 18th section of this statute, it is

* enacted, that every enrolment of a deed of bargain *447 and sale in the said register office, shall be deemed and adjudged to be the entering a memorial thereof pursuant to this act, and shall have the same force and effect upon the estate therein mentioned, in relation to all subsequent deeds, as if a memorial of such enrolled deed had been entered in the said register office.

7. By the stat. 7 Ann. c. 20, similar regulations are made for registering all deeds and conveyances that may affect any honors, manors, &c. in the *county of Middlesex;* with a proviso, (s. 17,) that the act shall not extend to copyholds, or leases at rack rent, or leases not exceeding twenty-one years, where the possession

goes with the lease; or to any chambers in Serjeant's Inn, the Inns of Court, or Inns of Chancery; or to any messuages, lands, or tenements in the city of London.

8. By the stat. 8 Geo. II. c. 6, similar regulations are made for registering all deeds and conveyances, that may affect any honors, manors, &c., in the *North Riding of the county of York;* with the same exception, as to copyholds and leases, as in the former statutes.†

9. By the 22d section of this last statute, reciting that deeds had often been destroyed by fire and other accidents, it is enacted, that any person having or claiming title to any honors, &c., in the said North Riding, may register at full length in the said register office, all deeds, writings and conveyances, under which such title shall be claimed, and that all copies of such entries and enrolments of such deeds, &c., signed by the register or his deputy, shall be good evidence of such deeds, &c., destroyed by fire or other accident; and by the 24th section it is enacted, that every such enrolment shall be deemed to be the entry of a memorial thereof pursuant to this act, and shall have the same force and effect in relation to all subsequent deeds.

10. The effect of these acts is merely to render a prior unregistered deed fraudulent and void, as to all subsequent deeds, *whereof memorials have been duly registered;* so that a purchaser or mortgagee can only be affected by a deed duly registered, of which he may have notice by examining the register; and not by any other deed whatever.

448* *11. The words of these acts, being "all deeds and conveyances," extend to every species of deed or instrument, by which lands may be conveyed or affected; and therefore an appointment, under a power, is considered as a conveyance within the register acts; and if not registered, will be postponed to a subsequent mortgage, duly registered.

12. The plaintiff came into Court under a mortgage deed, dated in September, 1749, to be paid £500 advanced by him to Thomas Robertson, and interest; or to have the estate sold, and to be paid thereout. The objection thereto was, that Robertson

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[† Wills of land may be registered under these acts. *Vide* tit. 38, c. 1.—*Note to former edition.*]

had no power to convey to the plaintiff, because he had before properly appointed the premises for the benefit of others; for that, by deed and fine in 1742, this estate was settled to the use of him and his wife, and afterwards to such uses as he and she, or the survivor, should by deed or will appoint. This power was, by a deed in 1744, executed by the husband and wife; and appointments were made therein for the benefit of the defendants, who therefore claimed prior to the plaintiff's mortgage in 1746. It was answered, that the appointment of the uses of that deed and fine could not be set up against the plaintiff, because the premises lay in Middlesex, where there was a register act; in consequence of which, this deed of 1744 would be void against the plaintiff, as not being registered till 1748; whereas his encumbrance was registered in 1746, immediately after its date. For the defendants it was argued, that the deed of 1744 was not of such a nature as was required by the statute to be registered; the defendant therefore had a prior title. (*a*)

Sir J. Strange, M. R. "Consider the intent and meaning of the act; this case is clearly within the mischief recited; for here is a person, in 1746, lending out his money on land security; and what is to defeat him is a deed in 1744 prior to him. He is clearly the very person intended, being by a secret or pocket deed to be defeated of the encumbrance he has advanced his money for, and taken care to register. He used all due diligence required by the statute, and is therefore *primâ facie* entitled to the relief prayed. Next consider whether the deed or instrument is of such a nature as to be within the provision of this act. The words are general, all deeds and conveyances; this is undoubtedly a deed, was executed as such, and conveys so as to affect lands, tenements, and hereditaments; because those claiming *under the power, claim under a deed, which *449 as far as it can operate, affects lands, &c. But it is said, this deed is not to be considered as a separate conveyance, but only as the execution of a power, and that all of it arises under the deed of 1742. If that construction were to prevail, there would be an end of the registry, and of the act of Parliament; for by this means a secret deed might be set up to defeat them.

(*a*) Scrafton *v.* Quincey, 2 Ves. 413.

This then being a conveyance actually affecting the lands, though in virtue of a preceding power in another deed, is within the intent of the statute; and, to the most common understanding, such a conveyance as ought to have been registered; otherwise an innocent person, induced to lend his money on land security, would be defeated. The plaintiff is, therefore, to be considered as a prior encumbrancer."

13. The register acts have, however, been so far *construed strictly*, that every deed, under which the party claims, must be *registered*, otherwise a purchaser cannot have notice of it. Upon this principle it has been determined, that the registering an *assignment of a lease* was *not a register of the lease itself.*

14. The defendant claimed under a lease made in 1730, by Lord Grandison, which was soon after mortgaged, and in 1731, sold to the defendant. The original lease was not registered, but the first mortgage of it, and the defendant's purchase, were; and it not being a lease at rack rent, the question was, whether this was registry, within the meaning of the statute. And the Chief Justice held it not to be sufficient; for the act says, the deed under which the party claims, with the witnesses' names, shall be registered; and of this a subsequent purchaser can have no notice by the bare registry of the assignment; and it is also required that the original be produced to the officer. (*a*)

15. It appears to have been the *intention* of those who framed the registry acts, that the *registering a memorial of a deed*, pursuant to these acts, should *operate as a notice of such deed to all persons whatever.* And that in all cases of registry, which is a public depository for memorials of deeds, and to which any person may resort, a purchaser ought to search, or be bound by notice of the registry, as he would of a decree in equity, or of a judgment at law.

16. The *courts of equity* have, however, adopted a *very* 450* *different* * *construction* of the register acts; and have determined that the registering a memorial of a second mortgage, is not constructive notice to the first mortgagee, who may therefore advance more money on the first mortgage. (*b*)

17. A lent money on lands, the mortgage being duly regis-

(*a*) Honeycomb *v.* Waldron, 2 Stra. 1064. (*b*) Tit. 15, c. 5.

tered; afterwards B lent money on mortgage on the same security, and his mortgage was also duly registered; and then A advanced a further sum of money on the same lands, without notice of the second mortgage. It was held by Lord King, that the registering of the second mortgage was not constructive notice to the first mortgagee, before his advancement of the latter sum; for though the statute avoided deeds not registered, as against purchasers, yet it gave no greater efficacy to deeds that were registered than they had before. (*a*)

18. One Wrightson advanced £800 on a mortgage in Yorkshire and registered his mortgage; afterwards one Hudson lent a sum of money on the security of the same lands, and took a judgment for it, which was registered; and then Wrightson advanced £270 more, without any express notice of Hudson's judgment. It was argued, on a bill brought by Wrightson to foreclose, that Hudson ought to redeem, upon paying the first mortgage; for that where such registers prevail, every encumbrance should be satisfied, according to the priority of its registry; and that the registering of Hudson's judgment was a constructive notice to Wrightson, sufficient to deprive him of the common benefit of a Court of Equity, whereby a first mortgagee without notice is to hold, till subsequent encumbrances are discharged. (*b*)

It was, however, resolved, that these statutes only avoid prior charges not registered; but do not give subsequent conveyances any further force against prior ones registered than they had before; that to have affected Wrightson, Hudson ought to have given him notice when he advanced his money; and that though Wrightson might have searched the register, he was not bound to do it. And therefore it was decreed, that Hudson and the mortgagor should be foreclosed, unless they paid off both the plaintiff's securities.

19. One Wilson being indebted to Morecock, and having taken a new lease of some lands, it was agreed by deed, that the lease should stand as a security for £800 and interest, and the *deed was registered. Wilson afterwards mortgaged the *451 premises comprised in the lease, to Dickens, for £800, and

(*a*) Bedford *v.* Bacchus, cited, Amb. 680. Rigge on Regist. 6.
(*b*) Wrightson *s.* Hudson, Rigge, 6.

delivered him the lease. Dickens had no notice of Morecock's security, at the time he took the mortgage. Wilson became a bankrupt, and Morecock filed his bill to be paid the money, agreed to be secured on the premises, prior to Dickens's mortgage. Dickens filed his bill, to be paid his mortgage-money, or to foreclose. The question was, whether Dickens, though he had not actual notice of Morecock's security, at the time he took the mortgage, should be affected by a constructive notice, arising from the circumstance of the deed being registered at the time. It was admitted, by the counsel for Morecock, that Dickens, having got the legal interest, would be entitled to priority, unless he could be affected by notice. That there was no evidence of actual notice, but it was insisted that the registration was notice of itself; and that, to give the Register Acts their proper and intended effect, the act of registration ought to operate as notice. And it was compared to the case of judgments; that which was first docketed had priority. (*a*)

On the other side, it was argued for the defendant Dickens, that the register acts were made for one single purpose: to give preference to a purchase-deed registered, before a prior deed not registered. But the act gave no greater efficacy to deeds which were registered, than they had before; and the case of Bedford *v.* Bacchus was cited for that purpose; that in the present case, Dickens, having got the legal interest, was entitled to be paid before a prior equitable encumbrancer, unless he was affected by notice; that here was no actual notice; and the registration was not constructive notice, according to the above determination. (*b*)

Lord Camden. "The question is, whether registration is presumptive notice to all mankind. If this was a new point, it might admit of difficulty; but the determination in Bedford *v.* Bacchus seems to have settled it, and it would be mischievous to disturb it. The Register Acts provide for one single case only, that is, to make unregistered deeds void against registered deeds; but there is no provision in these acts, in a case where all the deeds are registered. And yet it becomes a serious question, whether a court of equity should not say that in all cases of registry, which is a public depository for deeds, and to which

(*a*) Morecock *v.* Dickens, Amb. 678. (*b*) *Ante*, s. 17.

any *person may resort, a subsequent purchaser ought *452
not to search, or be bound by notice of the registry,
as he would of a decree in equity, or a judgment at law. It is a point in which a great deal of property is concerned, and is a matter of consequence. Much property has been settled, and conveyances have proceeded upon the ground of that determination. (*a*)

"In the case of Vandebendy, in the House of Lords, the doctrine about dower prevailed, because it had been practised in a course of conveyance. A thousand neglects to search have been occasioned by the determination in Bedford *v.* Bacchus, and therefore I cannot take upon me to alter it. If it was a new case, I should have my doubts; but the point is closed by that determination, which has been acquiesced in ever since." (*b*)

20. The courts of equity have, in another instance, considerably weakened the operation of the registry acts, by laying it down as a *rule*, that, where a *subsequent purchaser*, whose deed is registered, *has notice of a prior encumbrance at the time of his purchase*, although the deed by which such prior encumbrance was created, be not registered, such encumbrance shall notwithstanding take place of the deed so registered. For the object of the Register Acts being to give notice to subsequent purchasers, if a subsequent purchaser has notice, at the time of his purchase, of a prior conveyance, then it is not a secret conveyance by which he can be prejudiced; but he is in the same situation as if these acts had never been made; for his notice of the prior conveyance is as strong as if it had been registered; and it is his own folly if he proceeds in his purchase. (*c*) [1]

(*a*) *Ante*, s. 17. (*b*) Tit. 12, c. 3. Williams *v.* Sorrell, tit. 15, c. 2, § 31.
(*c*) Cowp. 712.

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[1] We have already seen (tit. 15, ch. 5,) that notice is of two kinds, direct or actual, and constructive; and that Ld. Ch. Baron Eyre has defined the latter, as in its nature no more than evidence of notice, the presumptions of which are so violent, that the Court will not allow it to be controverted. 2 Anstr. 438. It has also been stated to have been laid down as a general rule on this subject, that, where a purchaser cannot make out a title, but by a deed which leads him to another fact, he shall be presumed to have knowledge of the fact. Fonbl. Eq. B. 3, ch. 3, § 1; Moore *v.* Bennet, 2 Ch. Cas. 246; Mertins *v.* Joliffe, Ambl. 311, 314; Brush *v.* Ware, 15 Peters, R. 113, 114. But this rule has been qualified by this distinction, namely, that, where the recitals in prior deeds relate to other lands than those to which the treaty of purchase relates, the party is not chargeable with notice of them; for his attention is naturally drawn only

21. The first case on this subject arose in Ireland, where there is a general register act, nearly similar to those in England.

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to the subject then in hand; but where he agrees to purchase under limitations in a prior deed which it is necessary that he should look into, and which recites judgments or other incumbrances affecting that land, he must be presumed to have taken notice of them, because they directly affected his purchase. Hamilton *v.* Royse, 2 Sch. & Lefr. 327; Boggs *v.* Varner, 6 Watts & Serg. 469; Brush *v.* Ware, 15 Pet. 113, 114. The doctrine has been stated in still broader terms, that whatever is sufficient to put a party upon inquiry, that is, whatever has a reasonable certainty as to time, place, circumstances and persons, is, in equity, good notice to bind him. 1 Story, Eq. Jur. § 400. But vague and indeterminate rumor, or suspicion, are deemed quite too loose and inconvenient in practice to be admitted as sufficient. See further on this subject, 1 Story, Eq. Jur. § 395, 399, 400–408; 2 Fonbl. Eq. B. 3, ch. 3; 4 Kent, Comm. 179.

In the United States, the registration of a conveyance duly executed, and which the law requires or authorizes to be registered, is now everywhere held to be constructive notice to, and conclusive on, all subsequent purchasers claiming under the same grantor any estate, legal or equitable, in the same property. 1 Story, Eq. Jur. § 403, 404; 4 Kent, Comm. 178–180; Johnson *v.* Stagg, 2 Johns. 510; Evans *v.* Jones, 1 Yeates, 172; Shultz *v.* Moore, 1 M'Lean, 520; Tilton *v.* Hunter, 11 Shepl. 29; Bates *v.* Norcross, 14 Pick. 224; Heister *v.* Fortner, 2 Binn. 40; Frost *v.* Beekman, 1 Johns. Ch. R. 300; Parkhist *v.* Alexander, 1 Johns. Ch. R. 394. And to ascertain which of several deeds, executed on the same day, takes precedence, the Court will inquire into the fractional parts of a day. Lemon *v.* Staats, 1 Cowen, R. 592. If the deed is made by two, but is acknowledged by one only, it is held to be only presumptive notice, and not conclusive on subsequent purchasers. Shaw *v.* Poor, 6 Pick. 86. This rule applies also to subsequent attachments of the land, under process of law. Pries *v.* Rice, 1 Pick. 164; Dixon *v.* Doe, 1 Smed. & Marsh. 70. It is also well settled, that if a subsequent purchaser has notice, at the time of his purchase, of any prior unregistered conveyance, he shall not be permitted to avail himself of his title, against that conveyance. This doctrine is applied, in England, only in Courts of Equity; but in the United States it is recognized both in Equity and in the Courts of Law. 1 Story, Eq. Jur. § 397; 4 Kent, Comm. 179, 456. The ground of this doctrine is, that such purchase was made *malâ fide;* and therefore it is allowed to prevail only in cases where the notice is so clearly proved as to make it fraudulent in the second purchaser to take and register a conveyance, in prejudice to the known title of another. Ibid.; M'Mechan *v.* Griffing, 3 Pick. 149; Jackson *v.* Sharp, 9 Johns. 163; Corliss *v.* Corliss, 8 Verm. 373; Rogers *v.* Jones, 8 N. Hamp. 264; Porter *v.* Cole, 4 Greenl. 20; Beers *v.* Hawley, 2 Conn. 469; Garwood *v.* Garwood, 4 Halst. 193; Stroud *v.* Lockhart, 4 Dall. 153; [Knotts *v.* Geiger, 4 Rich. 32; Draper *v.* Bryson, 17 Mis. 2 Bennett, 71.] The notice, however, must be of a deed actually made; knowledge of an intended conveyance, or of a treaty of purchase, even though the deed of conveyance is in making, is insufficient. Warden *v.* Adams, 15 Mass. 233; Cushing *v.* Hurd, 4 Pick. 252.

[In *Maine*, since Rev. Stat. ch. 91, § 26, *actual* notice only will defeat the title of the grantee under the subsequent deed. Spofford *v.* Weston, 29 Maine, (16 Shep. 140.) Open and notorious occupation, and adverse possession by one holding under an unrecorded deed, will support a presumption that a subsequent purchaser had actual notice

Lord Granard, being tenant for life, remainder to his first and other sons, with a power of leasing, granted a lease for three

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of the first deed. Landes *v.* Brant, 10 How. U. S. 348. But see Harris *v.* Arnold, 1 Rhode Island, 126. The words "subsequent purchasers," in the recording act of Illinois, mean subsequent purchasers from the heir, as well as from the original grantor. Kennedy *v.* Northup, 15 Ill. 148.]

And if it be implied notice, it must be not merely a probable, but a necessary and unquestionable inference from the facts known to the party; leaving no reasonable doubt of the existence of the conveyance. M'Mechan *v.* Griffing, 3 Pick. 149; Jackson *v.* Elston, 12 Johns. 452; Dey *v.* Dunham, 2 Johns. Ch. R. 182; Lawrence *v.* Tucker, 7 Greenl. 195; Norcross *v.* Widgery, 2 Mass. 509; [Rogers *v.* Wiley, 14 Ill. 65; Wallace *v.* Cross, 3 Strobh. 266.] It must be more than is barely sufficient to put the party upon inquiry. Jackson *v.* Van Valkenburgh, 8 Cow. 260; Jackson *v.* Given, 8 Johns. 137.

It has already been seen, (tit. 15, ch. 5, § 47,) that notice to the counsel, attorney, solicitor or agent in the same transaction, is notice to the principal. See, also, Lawrence *v.* Tucker, *supra;* Jackson *v.* Van Valkenburgh, *supra;* Jackson *v.* Sharp, 9 Johns. 163. But notice to the attaching officer, or to the debtor, is not deemed notice to the creditor, even though it be communicated to him after the attachment, and before the land is taken in execution; for his title commenced by the attachment, and they were not his agents. Stanley *v.* Perley, 5 Greenl. 369; Coffin *v.* Rey, 1 Metc. 212.

The open and visible possession and improvement of land, by a grantee, whose deed is not registered, is presumptive evidence of notice to all persons, of the existence and extent of his title or claim; but it is not equivalent to the registration of his deed, for registration is in itself constructive and conclusive notice, not to be controverted, except where actual guilt is charged *criminaliter.* But possession, though generally satisfactory evidence of notice, may be rebutted by counter proof; as, where a lessee, already in possession, receives a deed of conveyance in fee, which is not registered; or, where one tenant in common, in actual possession and pernancy of profits, receives a deed from his cotenant, who has never occupied the land. See, on this subject, 4 Kent, Comm. 179, 5th ed.; Hewes *v.* Wiswell, 8 Greenl. 94, approved in Flagg *v.* Mann, 2 Sumn. 556; M'Mechan *v.* Griffing, 3 Pick. 149; Matthews *v.* Demerritt, 9 Shepl. 312; Scott *v.* Gallaher, 14 S. & R. 333; Hamburg *v.* Litchfield, 2 My. & K. 629. See, also, 2 Powell on Mortgages, ch. 14, p. 561 to 661 *a*, Rand's ed., where, in the notes of the learned editors, as well as in the text, the whole subject of notice is discussed with great ability and discrimination. If a party claims by two titles, and places but one of them on the Registry, his possession, if it is consistent with the recorded title, is not notice of the other. Plumer *v.* Robertson, 6 S. & R. 179; Woods *v.* Farmer, 7 S. & R. 382.

The registration of a deed defectively executed is not notice. *Supra*, § 1, note; Troop *v.* Haight, 1 Hopk. 61; Frost *v.* Beekman, 1 Johns. Ch. 300; Carter *v.* Champion, 8 Conn. 549; [Pope *v.* Henry, 24 Vt., (1 Deane,) 560; Johns *v.* Reardon, 5 Md. 81; S. C. 3 Md. Ch. Decis. 57; Johnston *v.* Slater, 11 Gratt, (Va.) 321; Ruskin *v.* Shields, 11 Geo. 636; Chotean *v.* Jones, 11 Ill. 300. An instrument not recorded within the time prescribed by statute, but afterwards acknowledged, or its execution proved, and then recorded, is effectual against third parties, from the time of its being recorded. DeLane *v.* Moore, 14 How. U. S. 253; see Pollard *v.* Cooke, 19 Ala. 188. Whatever is

lives, at a rent of $30 *per annum*, which was not registered. Lord G., being greatly in debt, came to an agreement with Lord Forbes, his eldest son, by the agency of Mr. Stewart, to sell him his life-estate, upon Lord Forbes's paying his father's debts, and securing him an annuity, and a jointure to his wife. The estate was accordingly conveyed to two persons in trust for Lord Forbes; and it was proved, that during the treaty for the purchase, Mr. Stewart, Lord Forbes's agent, had notice of the lease.

The conveyance to the trustees being registered, they 453 * * brought an ejectment against the lessee, and obtained judgment. The lessee applied to the Court of Chancery, and upon proving that Stewart had notice of the lease, at the time of the purchase, the Lord Chancellor decreed that a perpetual injunction should be awarded against Lord Forbes and his trustees. (*a*)

From this decree there was an appeal to the House of Lords of England; and it was insisted on behalf of the appellants, that it was against the plain words and intent of the Register Act, which made prior conveyances, not registered, fraudulent and void against subsequent conveyances, which were registered, as well in equity as at law; and especially in this case, where the appellant, Lord Forbes, was a purchaser for a valuable consideration.

On the other side it was argued, that if the registry of Lord Forbes's deed, after his having had full notice of the respondent's lease, should be a means of avoiding it, for no other reason than because it was not registered, the act of Parliament, instead of suppressing fraud, would be made use of to establish fraud.

The decree was reversed in part, the injunction being restrained

(*a*) Forbes *v.* Deniston, 4 Bro. Parl. Ca. 189.

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sufficient to put a purchaser of land upon inquiry as to the rights of others, is considered sufficient notice to him of those rights. And possession is enough to cause a purchaser to inquire into the title of the possessor. Rupert *v.* Mark, 15 Ill. 140. To constitute notice of an unregistered deed, possession under it must be exclusive and unequivocal. A mixed possession is not sufficient. Bell *v.* Twilight, 2 Foster, (N. H.) 500. The continued possession of land by a grantor, who has made a conveyance thereof duly recorded, and taken back a bond of defeasance which was not recorded, is no notice to third persons of the defeasance. Hennessy *v.* Andrews, 6 Cush. 170.]

to the life of Lord Granard; but as to the principal point the decree was affirmed.

22. In a case between two purchasers of lands in Yorkshire, where the second purchaser, having notice of the first purchase, but that it was not registered, went on and purchased the same estate and got his purchase registered; it was decreed, that having notice of the first purchase, though it was not registered, bound him, and that his getting his own purchase first registered was a fraud; the design of those acts being only to give parties notice, who might otherwise, without such registry, be in danger of being imposed on by a prior purchase or mortgage, which they were in no danger of when they had notice in any manner, though not by the registry. (*a*)

23. A person purchased a term for years in the county of Middlesex, knowing that it was chargeable with the payment of an annuity of £40; and having registered his own conveyance, he refused to pay the annuity because it was not registered. The Court of Exchequer was of opinion, that the purchaser was liable to the annuity, although it was not registered; for the statute only intended to give such notice of former encumbrances to purchasers, that they might not thereby be defrauded.

*But if a man knows, of his own knowledge, that there *454 is a prior encumbrance, and, notwithstanding that knowledge, becomes a purchaser, the statute never was intended to relieve such a person, though the first encumbrance was not registered; for where a man purchases with notice of a prior encumbrance, he purchases with an ill conscience, and therefore his purchase will never be established in a Court of Equity. (*b*)

24. The defendant, Edward Le Neve, (father of the plaintiffs,) in 1718, being possessed of leasehold estates in Kent and Middlesex, upon his marriage with his first wife, mother to the plaintiffs, in consideration thereof, and of the estate she was possessed of, by articles, covenanted to settle his leasehold estates upon trustees and their heirs, in trust for himself during his life; then as to so much of the premises as would amount to the yearly

(*a*) Blades *v.* Blades, 1 Ab. Eq. 358. 3 Atk. 654.
(*b*) Cheval *v.* Nichols, 1 Stra. 664. 2 Ab. Eq. 68.

value of £250, to Henrietta, his intended wife, for life, and as to the surplus, for the maintenance of the issue; and after her decease, in trust, as to the whole, for the issue of the body of Edward Le Neve, by Henrietta his wife, in such manner as he should by deed or will appoint; and in default of issue, in trust for himself and his heirs. In June, 1719, a settlement was made in pursuance of these articles; but neither articles nor settlement were registered pursuant to the 7th Ann. c. 20, for registering deeds in Middlesex. The defendant Edward had issue by his first wife, the two plaintiffs; and after his wife's death, 16th November, 1719, he, in consideration of an intended marriage with the defendant Mary, settled the same estate on Norton and Danridge, two trustees, in trust for himself for life; then, as to so much as would amount to £150 *per annum*, to Mary, his intended wife, for life, and then to the issue of the marriage. A settlement was made January 20, 1743, pursuant to these articles, and both articles and settlement were registered pursuant to 7 Ann. c. 20. But, previous to the articles, Norton, one of the trustees, who was an attorney, and trusted by both parties in preparing the settlement, had a copy of the articles made upon the first marriage, to take counsel's opinion upon. (*a*)

The plaintiffs brought their bill against Edward Le Neve, and Mary, his second wife, and the trustees in the second articles and settlement, and against some mortgagees of Edward Le Neve, to set aside the second articles and settlement, 455* upon account of *notice of the first to the trustee; and to have the estate disencumbered from the mortgages made by Edward Le Neve.

The Court, after having taken time to consider the case, gave judgment.

Lord Chancellor. "The general question in this case is, whether there appears a sufficient equity for the plaintiffs to set aside the second settlement, and to get the better of the legal estate, which by the registry is vested in the trustees of that settlement, for want of registering the first articles and settlement. This wholly depends upon the point of notice, and is properly to be divided into three questions. I. Whether

(*a*) Le Neve *v.* Le Neve, MSS. 3 Atk. 646. 1 Vez. 64. Amb. 436. Doe *v.* Allsop, 5 Barn. & Ald. 142.

it appears that Norton was attorney or agent for Mary Le Neve, the second wife. II. Whether notice to Norton be sufficiently proved according to the rules of this Court. And III. Whether, if both these appear, there be sufficient to postpone the second articles and settlement, and to give priority to the first, notwithstanding the Registry Act.

"As to the first question, it depends on the admission in Mrs. Le Neve's answer, wherein she denies notice of the former settlement; but this amounts to no more than a denial of personal notice. And she says, that Norton was attorney or agent for her husband, but that she consented he should prepare the marriage articles, she having confidence in him, upon her husband's recommendation. Now, if she confided in Norton, it is not material upon whose recommendation it was; nor is it material whether he was or was not employed by her husband."

Lord Hardwicke then cited the cases of Brotherton *v.* Hatt, (*a*) and Jennings *v.* Moore, (*b*) and said, "those cases proved it not to be material by whom Norton was originally employed, if he was trusted by Mrs. Le Neve.

"As to the second question, it was objected for Mrs. Le Neve, that notice being denied by her answer, and proved only by one witness, it was not therefore proved sufficiently within the rules of the Court. But I take the rule of Court, that where a fact is denied by an answer, it must be proved by more than one witness, to hold only where the answer contains an absolute denial of the same fact, which is proved by the witness. But where there is any difference between the facts, the rule does not prevail. In this case the denial is only general; whereas the bill *charges notice to Norton and Dandridge, the *456 trustees. This general denial amounts only to a denial of personal notice to herself, and is a kind of negative pregnant, which may be consistent with notice to her agent. Norton, the trustee, being examined for the plaintiffs, proves that a copy of the first articles was delivered to him, to take counsel's opinion upon, and which was probably on occasion of the second settlement; and I take this to be a sufficient proof of notice within the rule of this Court.

"The third and principal question is, whether the second arti-

(*a*) 2 Vern. 574. (*b*) 2 Vern. 609.

cles and settlement shall be postponed to the first, notwithstanding the legal estate vested by the Registry Act, by reason of the notice; which I shall consider, whether sufficient or not for that purpose,—I. If it had been personal. II. As the case is, where notice was given to the agent. The question is of great extent, and depends on the construction of the stat. 7 Ann. 20. By the recital in the preamble of that act, it appears, the intent was to secure purchasers against *prior and secret conveyances, and fraudulent encumbrances;* so that the mischief, intended to be obviated by the act, arose only in respect of the secrecy of former encumbrances. But if a person has notice of a prior encumbrance, it cannot be secret as to him. It was said that this act intended to establish a particular kind of notice, namely, by registering the conveyance. But this is only with regard to the legal estate; and the act does not take away the equity of the prior encumbrancer, but leaves the question still open as to him; and the subsequent purchaser, if he had notice, can be in no danger from a *secret* conveyance. The present case has been properly compared to that of the enrolment of bargains and sales within 27 Hen. VIII., which act, though not in the same words, is to the same effect as that under consideration. Now, upon that act, if there be a prior bargainee whose deed is not enrolled, and a second whose deed is properly enrolled, if this last had notice of the prior deed, the prior shall prevail in equity; and if he has any other conveyance, as, a feoffment, or a lease and release, the first vendee shall likewise prevail at law. I consider this registry act upon the same footing as the 27 Hen. VIII., and that it shall control only the legal estate. The case put at the bar, that if a man employs an attorney to register his deed, which he 457* neglects to do, and *afterwards gets another conveyance of the same estate, which he registers, the first deed shall prevail, is material. So, if another person, not an attorney, purchases with notice of a prior encumbrance. These cases, though clear, and stronger than the present, show that there may be relief in equity, notwithstanding the Registry Act.

"The case of Lord Forbes *v.* Deniston, (*a*) in the House of Lords, 27th Feb. 1722, which came from Ireland, where there is an act for a general register, is applicable to this question. There

(*a*) *Ante*, s. 21.

the late Earl of Granard had made a lease, which was not registered pursuant to the Irish act. He, and his son, Lord Forbes, afterwards made a subsequent conveyance to the use of Lord Forbes, &c., which last was duly registered, and carried the legal estate; but an agent of Lord Forbes had notice of the lease before this conveyance. This cause was twice heard in Ireland, on the last of which hearings, before Lord Middleton, 17th Feb. 1721, he decreed a perpetual injunction against Lord Forbes, to restrain his proceeding against the lessees, under the lease which was not registered. On hearing the cause in the House of Lords, Feb. 1722, the decree was reversed, because Lord Forbes disputed his father the Earl of Granard's power of leasing for any longer term than during his life. The Lords therefore adjudged that all proceedings against the lessees, (except for breach of covenants,) should be stayed during the Earl of Granard's life, and then Lord Forbes to be at liberty to try his right. So that they gave the lessees full relief as to the Registry Act; though the other question, as to Lord Granard's power of leasing, was still left open. In Blades *v.* Blades, (*a*) before Lord King, 2d May, 1727, a mortgage from an heir at law, who had notice of a will whereby the estate was devised to another, was decreed fraudulent and void against the devisee, though the will was not registered; which I the rather cite, because Lord King generally adhered to the law as much as any person that has sat in this Court. There was a case of Cheval *v.* Nichols and Hall, (*b*) in Scacc., in Lord Chief Baron Gilbert's time; where relief was given against the Registry Act upon equitable circumstances; which I mention only as a general authority, that equity may prevail against this act, without taking notice of the particular state of that case, where actual fraud was charged. But that of Blades *v.* Blades went merely on the point of notice; and in that *of Lord Forbes there was notice only to the *458 agent. All these authorities prove that the taking a legal conveyance, after notice of a former, is in itself a species of fraud, and takes away the *bona fides* of the subsequent encumbrancer, and puts him in *malâ fide;* for though he knew the first conveyance was not legal, yet he knew that the grantor's conscience was bound by it; and this is within the definition of *dolus malus*

(*a*) *Ante*, s. 22. (*b*) *Ante*, s. 23.

by the civil law; Dig. lib. 4, tit. 3, *de dolo malo*, 1 s. s. 2, where Labeo defines it, *omnem calliditatem, fallaciam, machinationem, ad circumveniendum, fallendum, decipiendum alterum, adhibitam.* This is the true ground of the determinations in all cases of notice.

If this be so as to notice in general, we are next to consider whether notice to the attorney or agent be sufficient. Now, if the ground of the determination be *mala fides*, it is all one whether it be in the party or in the agent. It is proved by Norton that the first articles were put into his hands, to advise with counsel; and it is objected that this may have been a fraud in Norton, in collusion with the husband, upon the defendant, Mrs. Le Neve. This may be the case; but who ought to suffer but the party who trusted Norton, the agent, and not those who did not trust him? In the case of Brotherton *v.* Hatt, it is probable the subsequent mortgagee was imposed upon; and so, probably, was the purchaser in Moore *v.* Jennings. And if I should determine this not to be a good notice, it would overturn all the cases of notice to the agent, who probably, in all those instances, imposed upon his principal. Here Norton was a trustee, and privy to the whole transaction; and I am therefore of opinion, that both as agent and trustee, notice to him was good notice to the party; and that this is sufficient to take the case out of the Registry Act."

25. But unless *notice of a prior unregistered deed or encumbrance* be *fully proved*, or there appear to have been some *fraud* in the transaction, the Court of Chancery will not give any relief.

26. A bill was brought by a judgment creditor, to be let in upon the estate of one Proof and his wife, in Middlesex, preferably to the defendant, who was mortgagee of the same estate; upon a suggestion that the defendant had notice of the judgment before the mortgage was executed; and likewise to inquire into the consideration of the mortgage. The judgment was entered on the 12th March, 1738, but not registered till the 12th
459 * of June, *1735. The mortgage was made the 24th of May, 1735, and registered the 2d June, 1735. (*a*)

Lord Hardwicke. "This case depends upon the notice the defendant had of the judgment, before his mortgage was regis-

(*a*) Hine *v.* Dodd, 2 Atk. 275.

tered. The Register Act, 27 Ann. c. 20, is notice to the parties, and a notice to everybody; and the meaning of this act was to prevent parol proofs of notice or not notice. But, notwithstanding, there are cases where this Court has broken in upon this, though one encumbrance was registered before another; but it was in cases of fraud. The first was an Irish case, in the House of Lords; the next was a Yorkshire case, before Lord King. There may possibly have been cases upon notice, devested of fraud, but then the proof must be extremely clear. But though, in the present case, there are strong circumstances of notice before the execution of the mortgage, yet, upon mere suspicion only, I will not overturn a positive law." He observed upon the evidence, that there was barely the evidence of a defendant's confession, in contradiction to his answer, and contrary to a positive act of Parliament, made to prevent any temptation to perjury from contrariety of evidence. But what weighed principally with him was the great danger of overturning an act of Parliament, and making it mere waste paper. To be sure, apparent fraud, or clear and undoubted notice, would be a proper ground of relief; but suspicion of notice, though a strong suspicion, was not sufficient to justify the Court in breaking in upon an act of Parliament. (*a*)

The Court therefore decreed, so far as the plaintiff's bill sought relief, by postponing the defendant's mortgage to the plaintiff's judgment, that it should be dismissed with costs.

27. In a modern case, a registered conveyance of premises in Middlesex, for valuable consideration, was established against a prior devise not registered; the evidence of notice, which ought to amount to actual notice, not being sufficient. And the Master of the Rolls, (Sir R. P. Arden,) said he regretted that the statute had been broken in upon by parol evidence; and was very glad to find that Lord Hardwicke, in Hine *v.* Dodd, had said that nothing short of fraud would do. (*b*)

28. The utility of the Register Acts is proved to a demonstration by two facts; namely, that lands in register counties, bear a higher price, and money is lent on the security of those lands, at * a lower rate of interest, than on estates situated *460

(*a*) Forbes *v.* Deniston, Blades *v.* Blades, *ante*, § 21, 22.
(*b*) Jolland *v.* Stainbridge, 3 Ves. 478. *Ante*, s. 26.

in counties where there is no register. It is therefore surprising that the legislature, with such proof before them, does not extend the Register Acts to all the counties in the kingdom. The reason usually given is, that the landed proprietors object to disclose the situation of their estates to the public; but, in point of fact, there is very little disclosure in a memorial drawn according to the rules prescribed by the Register Acts, as the consideration and uses of the deed need not be mentioned therein; nor does there appear to be any necessity for inserting more circumstances in a memorial, than those which are expressly required by the Register Acts; for every person who is inclined to purchase or take a mortgage of lands lying in a register county, may know to a certainty, by an examination of the register, what conveyances have been made of those lands which can affect him; and if he afterwards purchases, or lends money on them, without requiring the production of all those deeds, it is his own fault, and he has no right to expect any redress.

29. The Register Acts would have a much more powerful effect, if it were established that the registering a memorial of a deed should in all cases operate as notice, both at law and in equity, of such deed. The adoption of the opposite doctrine by Lord King, in the case of Bedford *v.* Bacchus, has been productive of infinite mischief, and appears to have been disapproved of by Lord Camden; but is now so fully established, that it can only be altered by an act of the legislature. (*a*)

30. It would also be a very great amendment of the law, if it was enacted by the legislature, that no averment should be admitted, either at law or in equity, that a person claiming under a deed that was registered, had notice of a prior unregistered deed. We might in this case, borrow some wisdom from ancient France, where several points respecting substitutions being unsettled, and the laws on this head being different, in different parts of that kingdom, they were all reduced into one by the ordinance of 1747, which was framed by the Chancellor D'Aguesseau, after taking the sentiments of every parliament in the kingdom upon forty-five different questions proposed to them upon

(*a*) *Ante*, s. 19. Wyatt *v.* Barwell, 19 Ves. 485.

the subject. The 39th question is, "Whether a creditor or purchaser, having notice of the substitution, before his contract or purchase, is to be admitted to plead the want of *registration." All the parliaments, except that of Flanders, agreed that he was. That to admit the contrary doctrine, would make it always open to argument, whether he had not notice of the substitution. That this would lead to endless uncertainty, confusion, and perjury; and that it was much better that the rights of the subject should depend upon certain and fixed principles of law, than upon rules and constructions of equity, which must be arbitrary, and consequently uncertain. The ordonnance was framed accordingly; and those who have commented upon it, lay it down as a fixed and undeniable principle, that nothing, not even the most actual and direct notice, countervails the want of registration. So that if a person is a witness, or even a party to the deed of substitution, still if it is not registered, he may safely purchase the property substituted, or lend money upon a mortgage of it. (*a*) *461

31. It is a common practice to *enrol deeds for safe custody*, that is, to get them transcribed upon the records of one of the King's Courts at Westminster, or at a court of quarter sessions. But every deed, before it is enrolled, must be acknowledged to be the deed of the party, before a Judge of the Court in which it is to be enrolled; or before a Master in Chancery, if intended to be enrolled in the Court of Chancery. This acknowledgment is signed by the Judge or Master in Chancery, before whom it is acknowledged; and such signature is the officer's warrant for enrolling the deed.

32. The enrolment of a deed does not make it *a record*, but it thereby becomes *a deed recorded.* For there is a difference between a matter of record, and a thing recorded to be kept in memory. A record is the entry in parchment of judicial matters, controverted in a Court of Record, and whereof the Court takes notice; but an enrolment of a deed is a private act of the parties concerned, of which the Court takes no cognizance at the time when it is done. (*b*)

33. Where deeds are enrolled for safe custody, the enrolment

(*a*) 1 Inst. 280 b, n. 1, s. 11.

(*b*) 2 Lilly's Pr. Reg. 69.

is evidence only against the party who sealed the deed, and all claiming under him; but the party enrolling can never afterwards aver that it was not his deed, or that he was within age, or under duress. (*a*)

(*a*) 2 Freem. 259. Bro. Ab. tit. Faits Enrol. pl. 11.

END OF VOL. IV. OF CRUISE'S DIGEST.

A

DIGEST

OF

THE LAW OF REAL PROPERTY.

BY WILLIAM CRUISE, ESQ.

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FURTHER REVISED AND ABRIDGED, WITH ADDITIONS AND NOTES, FOR THE USE OF AMERICAN STUDENTS,

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IN SEVEN VOLUMES.

VOLUME V.

CONTAINING

Title 33. Private Act.
34. King's Grant.
35. Fine.
Title 36. Recovery.
37. Alienation by Custom.

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A

DIGEST

OF THE

LAW OF REAL PROPERTY.

TITLE XXXIII.

PRIVATE ACT.

SECT. 1. *Alienation by Matter of Record.*
2. *Private Act.*
5. *What makes an Act private.*
11. *Some Cases where Private Acts may be obtained.*
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39. *Construction of Private Acts.*
43. *Effect of the general Saving.*
49. *May be relieved against.*
53. *Note.* [*Standing Orders of the House of Lords.*]

SECTION 1. Having explained the nature and operation of deeds entered into by private persons, which derive their effect from the consent of the contracting parties, we shall now proceed to treat of those assurances which are effected *by matter of record;* that is, *where the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one person to another.*

Assurances by matter of record, are, I. *Private acts of Parliament;* II. *King's Grants;* III. *Fines;* and IV. *Common Recoveries.*†

2. *Private acts* of Parliament derive their *origin* from the following circumstances. It was a common practice, so early as in the reign of Edward I., for persons to present petitions to Parliament for relief in private affairs. These were referred to certain prelates, earls, and barons, appointed at the meeting of every Parliament to be receivers and triers of petitions; who, upon examination of the contents of such petitions, indorsed upon them what course was to be pursued by the petitioners to obtain redress. (*a*)

3. In those cases, where the petitioners might have relief by the ordinary course of law, in the King's courts, the answer was, that the petitioners might sue at common law; and sometimes the petition was referred to the proper court in which the case was determinable. But when the petitioner could have no relief, without a new law made by an act of Parliament, either in that particular case, or which might by a general purview extend to it, the petition was referred to Parliament; and an award was made upon it by the King and the Lords, or by the Lords alone, and sanctioned by the King, which had all the effect and force of a statute.

4. In the first year of King Henry IV., the Commons indirectly claimed a right of concurring with the Lords in the consideration of petitions, and of joining in the awards made upon them; but the Archbishop of Canterbury told them, in the King's name, that they were only petitioners, and that all judgments appertained to the King and to the Lords; unless it were in statutes, grants, subsidies, or such like; the which order of the King would from that time be observed. It became, however, fully established in the reign of King Richard III., that no award could be made on a private petition, without a formal and complete act of the whole legislature; and therefore from this period such

(*a*) Hale's Juris. of Lords, c. 4 & 10. Id. c. 12.

[† As a bargain and sale of an estate of freehold or inheritance requires enrolment, it may, in a restricted sense, be considered an assurance of record. See Vol. IV. tit. 32, c. 29, s. 35.]

awards have been called private acts of Parliament, and have been distinguished in the statute book from public ones. (*a*)

5. A *private act* is described, by Lord Chief Baron Comyns, to be a *statute which concerns only a particular species, or thing, or person.*[1] In 39 Eliz. it was resolved by the Court of King's Bench, that the statute 21 Hen. VIII. c. 13, by which spiritual persons were abridged from having pluralities of livings, was a general act, because it concerned the whole spirituality in general. But it was admitted, that the statute 18 Eliz. c. 6, concerning *colleges in the two universities, and the colleges *3
of Eton and Winchester, was a private act. It was also observed, that the statutes 13 Eliz. c. 10, and 18 Eliz. c. 11, concerning colleges, deans, and chapters, hospitals, parsons, vicars, or any other, having any spiritual or ecclesiastical living, were general acts; and that the statute 1 Eliz., concerning leases made by bishops, was a private act, because it concerned bishops only, who are but a species of the spirituality. (*b*)

(*a*) Rot. Parl. Vol. III. p. 427, No. 78, 79.
(*b*) Com. Dig. tit. Parliament, R. 7. Holland's case, 4 Rep. 76. 5 Rep. 2, a.

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[1] Generally speaking, all statutes are public; those which are private being in the nature of exceptions to this general rule. 1 Kent, Comm. 459. Public acts do or may affect the whole community. Such are acts creating towns, counties, and other similar political corporations, or defining or changing their limits—Commonwealth *v.* Springfield, 7 Mass. 9; Portsmouth Livery Co. *v.* Watson, 10 Mass. 91; Gorham *v.* Springfield, 8 Shepl. 58; New Portland *v.* New Vineyard, 4 Shepl. 69; acts providing for the survey and sale of lands belonging to the State—West *v.* Blake, 4 Blackf. 234; acts for taxing bank stocks—Dean *v.* Holmes, 2 Penn. 1050; and the like. And to constitute a public statute, it is not necessary that it should take effect over the whole territory of the State; it is sufficient if it affects all persons coming within a certain district or place. Such are laws regulating the taking of fish in certain rivers, ponds, or towns—Burnham *v.* Webster, 5 Mass. 266; or, providing for the survey of lumber in a particular county—Pierce *v.* Kimball, 9 Greenl. 54; or for the inspection of other articles of produce or manufacture. Ibid. And though a statute be strictly private in its principal subject, as for example, to incorporate a bank, yet if it also enacts penalties to accrue to the State, or provides for the punishment of public offences in regard to the bank, it is a public statute. Charles Rogers's case, 2 Greenl. 303; Rex *v.* Baggs, Skin. 429. So, if a public statute expressly refers to, or recognizes the existence of a private statute, the latter thereby becomes entitled to be regarded in Courts as a public statute. James M. Rogers's case, 2 Greenl. 301; Samuel *v.* Evans, 2 T. R. 569; Lovell *v.* Sheriffs of London, 15 East, 320. So, if, in a statute of a private nature, there be a clause declaring it to be a public act. Brookville Ins. Co. *v.* Records, 5 Blackf. 170; 1 Greenl. Evid. § 481; Woodward *v.* Cotton, 1 C. M. & R. 41, 47.

6. It is also said in the same case, that if an act is *special*, which extends *ad species*, *a multo fortiori* that is special or particular, which extends *ad individua*. Now, although the matter be special, so that under it there be no *individua*, yet if it is *general as to persons*, it is a *general act*; but if it concerns *aliquod singulare*, *seu individuum*, although it be general as to persons, it will be deemed a private act. So, although the act, as to persons, be general, but the matter thereof concerns *individua*, or singular things, as a particular manor-house, &c., or all the manors, houses, &c., in one or sundry particular towns, or in one or divers particular counties, it is a private act. (*a*)

7. It is further laid down by the Court in that case, that every act, although the matter thereof concerns *individua*, or single things, yet if it *touches the King*, is a public act; for every subject has an interest in the King, as the head of the commonwealth. And it was resolved, in the case of Wyllion *v.* Barkley, that an act which was made in 35 Hen. VIII. by which all conveyances made by the Lady Catharine, (Henry's queen,) or to her, by, or to the King, should be valid, was a public act. (*b*)

8. In a *public act*, there may be a *private clause*, as in the statute 3 Jac. I. the clause which gives the benefices of recusants in particular counties to the universities, is a private act. The statute 23 Hen. VI. c. 9, respecting bail bonds, was for a long time considered as a private act; but in a modern case, it was held to be a public one. (*c*)

9. A private act is not printed or published among the laws of the sessions.[1] It remains, however, enrolled among the public records; and in general must be specially set forth and pleaded, otherwise no Judge or jury are bound to take notice of it. But it has lately been a practice, to insert a clause in acts of a private nature, declaring that they shall be deemed public acts. (*d*)

10. In modern times, a private act of Parliament respect-

(*a*) 4 Rep. 76, a. (Dwarris on Statutes, 629.)
(*b*) 4 Rep. 76, a. Plowd. 228, 231.
(*c*) Samuel *v.* Evans, 2 Term Rep. 569.
(*d*) 1 Inst. 98 b, n.

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[1] In the United States, the private acts are printed by authority, in the same manner as the public acts; and in most of the States, the Statute Book, thus printed, is made competent evidence of all the statutes it contains. See 1 Greenl. Evid. § 480.

ing *real property, which is usually called *an estate* *4
act, is a *conveyance or settlement of lands or hereditaments, made under the immediate sanction of Parliament*, in cases where the parties are not capable of substantiating their agreements without the aid of the legislature; and where the carrying such agreements into effect is evidently beneficial to the parties.[1]

11. It would be utterly impossible to enumerate the variety of *cases*, in which private acts of Parliament may be obtained. A few of them shall, however, be mentioned. †

12. Where a person is *tenant for life, with remainder to his first and other sons in tail*, under a will or settlement, and he has either no children, or his children are under age, if an *opportunity offers of selling the estate to great advantage*, a private act may be obtained for vesting such settled estate in trustees in fee, discharged from the uses of such will or settlement, upon trust to sell the same, and to lay out the money in the purchase of other lands, to be settled to the same uses.

13. Where a person, having *an estate in strict settlement*, [which does not contain a power to exchange the settled property,] has an opportunity of making an *advantageous exchange*

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[1] [It is deemed indispensable that there should be a power in the legislature to authorize a sale of the estates of infants, idiots, insane persons, and persons not known, or not in being, who cannot act for themselves. The best interest of these persons, and justice to other persons, often require that these sales should be made. It would be attended with incalculable mischiefs, injuries, and losses, if estates in which persons are interested, who have not a capacity to act for themselves, or who cannot be certainly ascertained, or are not in being, could under no circumstances, be sold, and perfect titles be effected. But in such cases the legislature as *parens patriæ*, can disentangle and unfetter the estates by authorizing a sale, taking the precaution, that the substantial rights of all parties are protected and secured. That the legislature has such power, and may rightfully exercise it, has been fully settled, and the reasons and grounds of it fully illustrated and explained. Rice *v.* Parkman, 16 Mass. 326; Davison *v.* Johannot, 7 Met. 388; Blagge *v.* Miles, 1 Story, R. 426; Clarke *v.* Van Surlay, 15 Wend. 436; Cochran *v.* Van Surlay, 20 Ib. 365; Bambaugh *v.* Bambaugh, 11 Serg. & R. 191; Estep *v.* Hutchman, 14 Ib. 435. This power can by no means be considered as dangerous or objectionable, but on the contrary, is a most necessary, useful, and beneficent power, which has long been habitually exercised, and should now by no means be fettered, or its rightfulness drawn in question. Sohier *v.* Mass. General Hospital, 3 Cush. 497.]

[† All, or most of, the purposes for which private acts have been obtained, will be ascertained by reference to Mr. Bramwell's Analytical Table of Private Statutes.—*Note to former edition.*]

with another person, or he is desirous of exchanging his settled estate for another estate, whereof he is seised in fee; a private act may be obtained for vesting the settled estate in the person with whom such exchange is agreed to be made, or in the tenant for life himself, in fee simple, and limiting the estate, taken in exchange, to the same uses to which the settled estate stood limited.

14. Where *an estate, limited in strict settlement, is charged with the payment of a sum of money*, a private act may be obtained for vesting the whole or a competent part thereof, in trustees, in fee simple, upon trust to sell the same, and out of the money to pay off the debts, and to lay out the surplus in the purchase of other lands, to be settled to the old uses.

15. Where a *tenant for life has no power of making leases*, and it would be *advantageous to the estate* if it could be *let for a long term of years*, a private act may be obtained for enabling the tenant for life to make long leases, under such reserva-
5* tions *and restrictions as are necessary to render such leases beneficial to the estate, and to the persons in remainder and reversion.

16. Where a *tenant for life* has expended his own money in making improvements beneficial to the inheritance, or is *desirous of making such improvements*, a private act may be obtained, enabling him to charge the estate with the money so laid out, or to be laid out on such improvements.

17. Where an estate is vested in several persons as *coparceners or tenants in common*, some of whom are *infants, lunatics*, † or *tenants for life;* and a fair and just partition is made thereof: a private act may be obtained for *confirming such partition*, by which the infants, lunatics, or remainder-men will be bound; and each person, to whom a share is allotted in severalty, will acquire the legal estate therein.

18. Where a *male infant is desirous of marrying*, with the approbation of his parents or guardians, a private act may be ob-

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[† By the Stat. 1 Will. 4, c. 65, s. 27, it is provided, that where any person shall have contracted to divide, exchange, or otherwise dispose of any land, and shall afterwards become lunatic, and a specific performance shall have been decreed, the committee, by direction of the Lord Chancellor, may, in the place of the lunatic, convey the land in performance of the contract.]

tained *enabling him to make a proper settlement* on such marriage; to be as valid as if he was of age. And there is an act in 14 Edw. IV., by which it was ordained that Henry, Duke of Buckingham, should be taken, reputed, and adjudged as a person of full age, and that all things by him or against him to be done, should be of such force and effect, as if they were done at his full age. (*a*)

19. Where *something has been omitted in a deed*, which is absolutely *necessary to carry it into execution*; or where there has been a palpable and evident mistake; a private act may be obtained to *supply such omission*, or to *rectify such estate*.

20. Where parishes or commons are agreed to be enclosed, a private act is usually obtained for that purpose, called *an enclosure act*, of which there are a vast number. By these acts, commissioners are appointed to carry the intention of the parties into execution; who are directed to allot and award to the parties in severalty, such portions of land as are equivalent to their former portions of common fields, or to their rights of common. And in a modern case it was resolved, by the Court of King's Bench, * that by the general enclosure act, the legal title to *6 an allotment was not acquired until the execution and proclamation of the commissioners' award. (*b*)

21. Where a private act originates in the *House of Peers*, the *mode of proceeding* is thus: a *petition* is presented to the House signed by all the parties interested in the act, stating the facts, and that the petitioners can only be relieved, or obtain what they require, by means of the power and authority of the legislature; and praying leave to bring in a bill for that purpose. This must be presented by a peer, and an order of the House is made, *referring the petition to two of the Judges*, who are directed to summon all persons concerned in the bill before them, and after hearing them and perusing the draft of the bill, to report to the House the state of the case, and their opinions thereon, under their hands, and to sign the draft of the bill.

22. The petition is then carried to the two Judges to whom it is referred, together with *a draft of the bill;* of which all the recitals must be *proved* before them, in the same manner, and by

(*a*) Rot. Parl., Vol. VI. p. 128. No. 24.
(*b*) *Vide* 41 Geo. 3, c. 109. Farrer *v.* Billing, 2 Barn. & Ald. 171.

the same evidence, as in a trial in ejectment. The Judges make their report to the House of Peers; and, if they approve of the draft of the bill, they sign it, and certify that it is proper for effectuating the purposes intended.

23. *The bill* is then brought into the House of Peers, read twice, and *committed.* The *same proofs* must be submitted to the *committee of Lords*, which were produced before the two Judges; and afterwards the chairman reports it to the House. It is then read a third time, and sent to the House of Commons, where it goes through the *same forms*, and is then sent back to the House of Peers to receive the royal assent.

24. Where a private act of Parliament originates in the *House of Commons*, a *petition* is presented, signed by the parties who are suitors for such act, stating the facts, and praying leave to bring in a bill; which petition is presented to the House by a member. A motion is then made that it be *referred to a committee*, to examine the allegations in the petition. The *evidence* must be produced before this committee, and when concluded, the chairman makes his report, and moves for leave to bring in a bill, pursuant to the petition. The *bill* is then brought in, read twice, and *committed;* all the *evidence* is again produced before the *new committee*, which the chairman reports to the
7* House, * and moves that the bill be engrossed. It is then read a third time, and *sent to the House of Peers.* There it is twice read, and then committed. The *evidence is again produced* before the committee of the House of Peers; the lord in the chair reports the bill to the House, it is read a third time, and then receives the royal assent.

25. The *consent of all parties* in being, and capable of consenting, *who have the remotest interest* in the property affected by a private act, is *expressly required;* unless, (says Sir W. Blackstone,) such consent appears to be perversely, and without any reason, withheld. (*a*)

26. Where *infants*, *lunatics*, or other *persons incapable* of acting for themselves, are to be bound by a private act of Parliament, a *full equivalent* must be given to them, in lieu of what is taken from them by the act; and in general, the legislature will not suffer the property of persons of this description to be altered

(*a*) 2 Bl. Comm. 345.

by a private act of Parliament, unless it clearly appear that they will be benefited by such alteration.[1]

27. A *general saving* is now always added to every private act of Parliament, *of the rights and interests of the Crown*, and *of all private persons;* except those whose consent is given or purchased; and of all persons claiming under them, who are therein particularly enumerated and named.

28. By a number of standing orders, made at different times by the Houses of Lords † and Commons, every sort of precaution appears to have been adopted by the legislature, to prevent the possibility of surprise or fraud in obtaining private acts, and particularly as to estate bills, which must be referred to two Judges to report on the facts, and the propriety of the bill; but still there have been some cases in which great imposition has been practised on Parliament by false evidence. (*a*)

29. With respect to the *operation of a private act of Parliament*, it is as powerful and effective, if duly and properly obtained, in transferring the legal estate in lands from one person to another, and in binding all those who are intended to be bound by it, and whose rights are not saved, as a public one.[2] But it has been always held that a private act *does not bind strangers*, even before the general practice of inserting a saving clause in it was adopted. (*b*)

*30. Thus, in 21 Hen. VII. it was adjudged, in the case *8
of the Prior of Castleacre and the Dean of St. Stephen's,
that the act 1 Hen. V. c. 7, which gave the lands of priors aliens to the King, did not extinguish an annuity of the Prior of Castleacre, which he had out of a rectory, parcel of a priory alien; though there was not any saving in the act. (*c*)

31. So in the case in 8 Jac., where the question was, whether

(*a*) *Vide* 34 Geo. 3, c. 66. (*b*) Brett *v.* Beales, 1 Moo. & Malk. 417. (*c*) 8 Rep. 136 a.

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[1] [And where no provision was made in a private act to protect the rights of those entitled to the remainder in the lands, the previous conveyances of which it was sought by the act to confirm, the act was held unconstitutional and void. Sohier *v.* Mass. General Hospital, 3 Cush. 493.]

[2] A local act, authorizing the taking of land by preëmption, for a market, though containing a clause making it a public act, is not thereby made notice to all persons of the right of preëmption and taking therein contained. Ballard *v.* Way, 1 M. & W. 520.

[† See the end of this chapter.]

the act 22 Edw. IV. c. 7, which, under certain circumstances, authorizes the proprietors of grounds in forests, after a felling, to enclose them, without the King's license, for seven years, to preserve the springing wood, should be construed so as to exclude persons having right of common. (*a*)

Upon this point Lord Coke reports, that the Judges of the Court of Common Pleas were of opinion, the commoners were not bound by the statute, for the following reasons: — "It appears, by the preamble, between what persons, and for and against what persons, this act was made; and the parties to this great contract, by act of Parliament, are the subjects having woods, &c., within forests, chases, and purlieus, of the one part, and the King, and the other owners of the forests, chases, and purlieus, of the other part. So that the commoners are not any of the parties between whom this act was made;" and cited the case of the Prior of Castleacre.

32. In a subsequent case, Lord Hale said: — "Every man is so far party to a private act of Parliament, as not to gainsay it; but not so as to give up his interest. 'Tis the great question in Barrington's case, 8 Co. The matter of the act there directs it to be between the foresters and the proprietors of the soil; and therefore it shall not extend to the commoners, to take away their common. Suppose an act says, whereas there is a controversy concerning land between A and B, 'tis enacted that A shall enjoy it; this does not bind others, though there be no saving; because it was only intended to end the difference between those two." (*b*)

33. It was formerly the usual practice, where a tenant in tail applied for a private act of Parliament to bar his estate tail, and convert it into a fee simple, that the persons in remainder and reversion should give their consent to the act. But although such consent be not given, yet *an estate tail*, and *all the remainders over*, and also *the reversion*, may be *barred by a private act* of Parliament.* This point is fully established in an opinion given by the late Mr. Booth, on the following case:—

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34. The Duke of Kingston, being tenant for life under the will of Evelyn, Duke of Kingston, with remainder to his first and

(*a*) Barrington's case, 8 Rep. 136. Godb. 167.
(*b*) Lucy *v.* Levingston, 1 Vent. 176. (1 Kent, Comm. 460.)

other sons successively in tail male, remainder to Granville, Earl Gower, in tail male, with several remainders over, and having no son, agreed with Lord Gower for the purchase of his interest in the estates thus devised, in consideration of £21,000; and, in order to carry this agreement into execution, the Duke and Lord Gower, without the consent of any of the persons in remainder, applied for an act of Parliament, stating the preceding facts, and stating that although Lord Gower was enabled by law, with the concurrence of the duke, to bar the remainder in tail vested in him, and all the remainders, and the reversion expectant thereon, yet, as the premises agreed to be purchased by the duke were limited, after his death, to his first and other sons in tail male, they could not be vested in him in fee simple, without the aid of an act of Parliament. (*a*)

A private act was accordingly obtained, by which it was enacted, that the estates in question should be vested in two persons, and their heirs, freed from the uses declared in the late duke's will, and should be to the use of the then duke and his heirs; and other estates of equal or greater value were vested in two persons, to the use of the Duke of Kingston for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons successively in tail male, remainder to the duke in fee, with a general saving of the rights of all persons, except the duke and his heirs, and the first and other sons of his body, and their heirs male, and Lord Gower and the heirs male of his body, and all persons claiming any estate in the premises under the will of Evelyn, Duke of Kingston.

The Duke of Kingston, being desirous of selling one of the estates, vested in him in fee under this act, a doubt was suggested touching the effect of the act, with respect to the persons claiming under the late duke's will, in remainder, expectant on the determination of the estate tail vested in Lord Gower; how far their rights and interests were barred by the act; as well in the estate whereof the uses were discharged by the act, as in the estates settled by way of equivalent; the same being limited *to the duke in fee simple, upon failure of issue male *10 of his own body, and to the uses limited in the will.

In answer to this objection, Mr. Booth gave an opinion, that

(*a*) Cases and Opinions, 8vo. Vol. II. 400.

even supposing the rules and orders of the House of Peers, with respect to summoning all persons concerned in interest to appear and consent, were not observed, this would not invalidate the act, for either House of Parliament might dispense with their own orders, whenever they thought fit; but here was no grievance, no irregularity. The rights of the persons in remainder, after Lord Gower's estate tail, were of no value, since by a common recovery duly suffered, those rights could be annihilated in the next term; as the parties were obliged to go to Parliament, they were advised, and rightly advised, that to suffer four recoveries, (for the lands lay in four counties,) would be to go to a needless expense; for that in a case where parliamentary assistance was, on other accounts, indispensably necessary, there the Parliament would so frame their words, which were to become a law, as to have the same force and operation, and to bar all rights that would be barred by a common recovery. *Frustra fit per plura, quod fieri potest per pauciora*, was a rule of equity, reason, and good sense.

35. The doctrine, here laid down by Mr. Booth, has been fully confirmed by a modern case, in which Lord Chancellor Apsley held, that a private act of Parliament would bar an estate tail, and all the remainders expectant thereon, and also the reversion, although the rights of the remainder-men were not excepted in the saving.

36. Robert Westby, being tenant for life, under a settlement of an estate in Lancashire, with remainder in fee to four persons, as heirs at law to the settlor; and being tenant in tail of another estate in Yorkshire, with remainders over, under which the defendant, John Westby, claimed; and having occasion for money to pay debts, and one of the heirs at law being an infant, a private act was obtained in 1731, on the application of Robert Westby, and the heirs at law, by which a part of the Lancashire estate was vested in trustees, to be sold for payment of Robert Westby's debts; and the Yorkshire estate was vested in trustees, to the use of Robert Westby for life, with limitations over, as in the settlement; with a power for Robert Westby, in case of failure of issue male of his body, to charge the Lancashire
11* *estate with a sum of money. The saving clause at the end of the act, saved the rights of all persons, except those

of Robert Westby, of the reversioners of the Lancashire estate, and of the heirs and issues of Thomas Westby; but no exception of the heirs or issue of ——— Westby, under whom the defendant, John Westby, claimed. (*a*)

Robert Westby, by deed in 1732, executed his power, and died without issue, having devised the money, charged by the execution of the power, to his executors, upon several trusts.

Upon a bill filed by the executors, to have the sums raised which were charged by Robert Westby, a question arose whether the power given by the act of Parliament, to charge the Yorkshire estate, could take place against the defendant, John Westby, who claimed under ——— Westby, the person entitled in remainder upon the death of Robert Westby without issue. Lord Apsley was clearly of opinion, that Robert Westby, being tenant in tail of the Yorkshire estate, the right of those in remainder was, and was meant to be, barred by the act; and that there was no occasion to except their rights, as was done in other cases where the act passes upon the application of a tenant for life; for Robert Westby, being tenant in tail, might have barred the remainder by a recovery; and therefore this case differed from that of the Duke of Somerset, who procured an act of Parliament for the exchange of livings; he was only tenant for life; and the right of those in remainder not being excepted out of the saving clause, they were not bound by the act. (*b*)

37. But where a *tenant for life* enters into an agreement to convey the fee simple, and a *private act of Parliament* is passed for establishing such agreement, in which is a saving of the rights of all persons, not parties to the act, it *will not affect the persons entitled to the remainder* expectant on the life estate.

38. Thus, in the case alluded to by Lord Apsley, in Westby *v.* Kiernan, it appeared that Charles, Duke of Somerset, having the honor of Petworth, was desirous of acquiring the rectory appendant to it, which belonged to Eton College; and not having any benefice or advowson whereby he could tempt the college to give him the rectory of Petworth in exchange, he applied to and prevailed on the Crown to give to the college the advowson of Worplesdon, and the duke in return agreed to give to the *Crown the rectory of Overblowes as an equivalent. *12

(*a*) Westby *v.* Kiernan, Amb. 697. 4 Geo. 2, c. 29. (*b*) *Infra*, s. 38.

Whereupon it was agreed, that the advowson of Worplesdon should be vested in Eaton College, the rectory of Petworth in the Duke, and the rectory of Overblowes in the Crown, forever. (*a*)

This agreement was confirmed by a private act of Parliament, in 4 & 5 Will. and Mary, whereby it was enacted, that the advowson of Overblowes should be, and thereby was vested and settled in their Majesties and their successors, in right of their Crown, forever; that the advowson of Worplesdon should be settled and vested in the provost and college of Eton, and their successors, forever; and that the advowson of Petworth should be, and was thereby vested in the Duke and Duchess of Somerset and their heirs, with a saving of the rights of all persons (other than their Majesties, &c., the Duke and Duchess of Somerset and their heirs, and Eton College and their successors,) to the said advowsons, or any of them.

It was afterwards discovered, that by a settlement made previous to this act, the rectory of Overblowes was limited to the use of the Duchess of Somerset for life, remainder to her son Algernon, Earl of Hertford, in tail male, remainder to the issue female of the duchess; and that Lord Hertford having died without issue male, the rectory vested in his sister, Lady Catherine, who married Sir W. Wyndham, and died leaving Charles, afterwards Earl of Egremont, her eldest son, who died leaving George, Earl of Egremont, his eldest son.

It was admitted on both sides, that upon the death of the Duke of Somerset, the rectory of Overblowes vested in Lord Egremont; because he was within the general saving of the act.

39. *Private acts are construed in the same manner as conveyances that derive their effect from the common law;* therefore, where any doubt arises upon the construction of a private act, the Court will consider what the *object and intention* of the parties was in obtaining the act; and will, if possible, give effect to that intention. (*b*) [1]

(*a*) Provost of Eton *v.* Ep. Winton, 3 Wils. R. 483.
(*b*) Doe *v.* Brandling, 7 Bar. & Cress. 643.

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[1] Ambiguous words, in a private statute incorporating a public company, as, for example, a water company, are to be construed against the company, and in favor of the rights of private property. Scales *v.* Pickering, 4 Bing. 448. And where the lan-

40. In the case of the Provost of Eton *v.* The Bishop of Winton, which has been already stated, the Crown having lost the advowson of Overblowes, to which Lord Egremont became entitled, claimed from the College of Eton the advowson of Worplesdon, and presented to it; upon the principle, that the whole transaction became void by the defect of title in the Duke of Somerset to the *advowson of Overblowes; whereupon 13*
the College of Eton brought a *quare impedit.* It was contended on the part of the Crown, that private acts were to be construed like deeds; and that this act should be considered as an exchange, in which there was a mutual warranty; and that the eviction of the advowson of Overblowes, by Lord Egremont, gave the Crown a right to be restored to the advowson of Worplesdon. But it was answered, on the part of the College of Eton, that the act could not be considered as an exchange, because an exchange could only be made between two parties; besides, the act could not be construed to operate as a deed of exchange, the word "*exchange*" not being once mentioned therein; the act made use of no words of conveyance, but vested the several advowsons in the respective parties, under the agreement. Judgment for the College. (*a*)

41. A private act was passed in the year 1777, for enclosing and dividing the common and waste lands within the manor of Yealands, by which it was enacted that the commissioners should set out, allot, and assign unto the lady of the manor, twenty statute acres of the common and waste grounds, in lieu

(*a*) *Ante*, s. 38. Tit. 32, c. 6.

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guage of the charter of a company, imposing a rate or toll upon the public, is ambiguous, or will admit of different meanings, that construction is to be adopted, which is most favorable to the public. Barrett *v.* Stockton and Darlington Railway Co. 2 M. & G. 134. Indeed, in no case ought private statutes, made for the benefit of one class of private citizens, to be so construed as to affect the rights of others, unless such construction results from express words, or by necessary implication. Coolidge *v.* Williams, 4 Mass. 140. And see Wales *v.* Stetson, 2 Mass. 143; Hood *v.* Proprietors of Dighton Bridge, 3 Mass. 263; Perry *v.* Wilson, 7 Mass. 393.

In the exposition of a private statute, it is not proper to resort to the language of any other private statute, not relating to the same parties and the same subject-matter; such private statutes being governed by the same principles as contracts by deed, and therefore not ordinarily to be affected by extraneous evidence. Thomas *v.* Mahan, 4 Greenl. 513.

of, and as compensation for, her right and interest in and to the soil of the residue of the common; and then that the commissioners should allot and assign the residue of the common unto, for, and amongst the said lady of the manor, for and on account of her messuages, tenements, lands, and hereditaments within the said manor, in respect whereof she was entitled to right of common, and to the several other persons having right of common, and to their heirs and assigns forever, according and in proportion to their several and respective rights, &c. (*a*)

A subsequent clause directed, that "all and every the allotments, &c., to be made under the act, should be vested in fee simple in the several and respective persons, &c., to whom the same should be set out or allotted, and their heirs, assigns, and successors respectively forever, absolutely freed and discharged of and from all customary tenures, rents, fines, boons, and services whatsoever; and that the several shares or allotments to be set out as aforesaid, should be in lieu of, and in full compensation and satisfaction for all right of common, and other former property, privilege, right, &c.; and that all rights of common, together with all former rights, interests, profits, &c., in and upon
14* *the same, should, from and immediately after that time, cease and be forever barred and extinguished. Provided always, and it was further enacted, that nothing in that act contained should extend to prejudice, lessen, or defeat the right, title, or interest of the said lady of the said manor, her heirs or assigns, of, in, or to the seigniories incident or belonging to the said manor; but that she and they and every of them should and might, at all times thereafter, hold and enjoy all rents, fines, services, courts, perquisites, and profits of courts, goods and chattels of felons and fugitives, felons of themselves, and put in *exigent*, deodands, waifs, estrays, forfeitures, *and all other royalties* and manorial jurisdictions whatsoever, in and upon the said common and waste grounds thereby intended to be enclosed as aforesaid, to the said manor, or the lord or the lady thereof for the time being, incident, belonging, or appertaining; and the same in as full, ample, and beneficial a manner, to all intents and purposes, as she or they might or could have held or enjoyed the same, in case the act had not been made."

(*a*) Townley *v.* Gibson, 2 Term R. 701.

Before the passing of this act, the lady of the manor was entitled to the mines and minerals lying under the soil of the manor, of which they had made several leases, the last to one Tissington in 1757, for twenty-one years, under which the mines were worked, and continued to be so till the year 1759; but from that period, the lessee discontinued the works, though the lease was subsisting at the time when the act was made.

The question was, whether the lady of the manor was entitled to the mines, under the clause of reservation in the act, allotting the inclosures to the several tenants of the manor.

*Lord Kenyon: "I agree that private acts of Parliament are to be construed according to the intention of the parties; but then that intention must be collected from the words used by the legislature, without doing violence to their natural meaning. The defendant's counsel has supposed that mines are a distinct right from the right to the soil; but I do not think so, where they are under the soil of the lord of the manor. In cases of copyholds, a lord may have a right under the soil of the copyholder; but where the soil is in the lord, all is resolvable into the ownership of the soil, and a grant of the soil will pass every thing under it. The only word in the saving clause which affords any ground for argument, is the word "*rents;*" but when we see how that word is used with the others in that part of the act, it cannot be taken to include mines. At the time of passing this act of Parliament, the mines under the waste ground were in the lady of the manor, as part of the demesnes. She intended to give up several rights to the tenants, for which she has reserved a satisfaction. Then how do the tenants hold their allotments under the act? They could not take as copyholders, unless the act of Parliament had so directed; but they take their allotments as freehold estates of inheritance. It is extremely clear that no new tenure can be created, unless by the authority of Parliament, since the statute of *quia emptores;* nor can any person reserve to himself a right of escheat. Then it was urged, by the defendant's counsel, that the act of Parliament could not affect the lease, which was in existence when it passed. It certainly could not; neither would it have been affected, if the lady had sold her estate in the manor; but the alienee would have become the landlord, and entitled to the beneficial interest re- *16

served by the lease. So here, the lease will remain valid, but the right to the rent of the mines will pass to the person in whose favor the allotment was made under the act. For we cannot narrow the words of this act; and that transfers all the right in the soil to the several tenants. There is no doubt but that the mines might have been reserved. If it had been so intended, it would have been by express words; but there is no such reservation here. The word "*rents*" is explained by the other
17* words used; *but those rights which are reserved, are mere badges of royalty, incorporeal rights, and other fruits of tenure of the same sort." The other Judges concurred.

42. A *recital* in a private act, *as to the construction of a deed recited* in such act, is *not binding* on the parties. (*a*)

Thus, it has been stated, that, in the Duke of Richmond's case, a private act was obtained for vesting the lands purchased with the £60,000 in the eldest son, upon his securing the portions to the younger children. In this act, it was recited that the younger sons and daughters of the late Duke of Richmond were, by virtue of the said marriage articles, severally seised of and entitled to the lands then purchased with the said £60,000, as tenants in common, to them and the heirs of their respective bodies, with cross remainders of such of their respective shares, in case of any of their deaths without issue, to the survivors of them, in common, in tail.

Lord Apsley, in his judgment on this case, said, it was mentioned in the recital of the act, that the younger children were entitled, as tenants in common, to estates tail, with cross remainders, in case of the death of one or more of them. But though this recital was inserted in the act, yet there was no notice taken of it in the enacting part, which was quite silent as to that question. (*b*)

It had been argued, on the part of the plaintiff, that the duke was bound by this recital. If it had been enacted that cross remainders were limited between the younger children, though founded upon a misrecital, yet it would have been conclusive against the duke, and cross remainders established; though, generally, recitals in private acts, or in deeds, are not binding to the parties; nor, as this recital was, had it at all affected the case.

(*a*) Tit. 32, c. 21. (*b*) Collect. Jur. Vol. II. 374.

Therefore the question was fairly open, for the duke to contend that there were no cross remainders established.

But this recital, though not conclusive, would have some weight; for it showed that the persons who prepared and passed the act, looked upon the articles in that light; which the Court would pay a regard to, though it might not be of opinion that such recitals should constantly bind.

43. With respect to *the general saving clause*, which is inserted in every private act, difficulties have arisen on the construction of it, where it was contradictory to the body of the act.

* Thus, in the case of Alton Woods, it is laid down *18 that *a saving* in an act of Parliament, which is *repugnant to the body of the act*, is *void;* as in Plowden, 365, where the supposed attainder of the Duke of Norfolk was, by act of Parliament, 1 Mary, declared to be void *ab initio*, saving the estate and leases made by King Edward VI., and the saving was held to be void; for where the attainder was held to be void, the saving was against the body of the act, and therefore void. (*a*)

44. This doctrine appears to have been supported in modern times; it being held, that the general saving clause, in a private act, will not control the provisions contained in the body of the act, but must be so expounded, as to be rendered consistent with the body of the act, or else be void.

45. A private act was obtained for the sale of Lord Stawell's estate, by which it was enacted, that the estate should be vested in trustees, to be sold; and that the money, arising from the sale, should be, in the first place, applied to pay the mortgagees, and afterwards the creditors by statutes, judgments, and recognizances. At the close of the act, there was a general saving of the rights of all persons, except the heir at law, and others of Lord Stawell's family. (*b*)

Several of the statutes and judgments were prior to some of the mortgages, and there being a decree for sale and execution of the trust created by the act, a question arose in the Court of Chancery, upon a special report, whether the mortgagees should be paid in the first place, or whether the creditors by statutes, judgments, and recognizances, should be let in according to their priority, or be postponed to the mortgagees.

(*a*) 1 Rep. 47 a.

(*b*) Ward *v.* Cecil, 2 Vern. 711.

For the creditors by statutes, judgments, and recognizances, it was insisted, that their securities bound the land as well as the mortgages. They were, both in law and equity, to be considered as having a prior right to the subsequent mortgagees. And although, in the beginning of the act, it was provided, that the mortgagees should be paid in the first place, yet there was a general saving of the rights of all persons, except the heir at law, and those of Lord Stawell's family; and that saving set the matter at large again, and restored them to their priority. (*a*)

Lord Cowper said, the act expressly provided, that the mortgages should be paid in the first place; and the general saving must not control the express provision of the act, but
19* must be so * expounded, as to consist with the express preference given to the mortgagees; and he must decree the execution of the trust accordingly; but seemed to admit, that by virtue of the general saving in the act, they might make use of their incumbrances as they could at law.

46. In the case of Westby *v.* Kiernan, which has been already stated, the right of the remainder-man, expectant on the determination of the estate tail, was saved, not being excepted in the general saving; and yet he was held to be barred, for otherwise the act would have been nugatory. (*b*)

47. Where the enacting part of an act of Parliament for inclosing the wastes and commons of a manor, expressly exonerates certain lands from the payment of tithes, the rector will be barred from claiming tithes out of those lands, though he be comprehended in the saving clause of the act.

48. By an act of Parliament, made in 13 Geo. III., for inclosing and dividing certain moors, commons, or tracts of waste land within the parish and manor of Lanchester, it was enacted, that the commissioners should, after setting out thirty acres to the curate of Latley, and other portions of land for the purposes therein mentioned, set out the residue of the said land unto and amongst the Bishop of Durham, who was the lord of the said manor, and the several other persons having rights of common thereon, according to the value of their respective estates; and that all such lands as should be allotted to any persons, in respect of their respective lands and tenements, should be held by them

(*a*) Tit. 15, c. 5. (*b*) *Ante*, s. 36.

in the same manner as their respective messuages, &c., in right of which such allotments were holden respectively; and subject to the same species of tithes only, in the same manner, and to the same persons, as they were accustomed to pay. (*a*)

It was further declared, that the said commissioners might sell so much of the said moors or commons as they should think fit, to raise money to pay the expenses attending the obtaining and executing the act, and the expense of dividing the said moors and commons, making public highways, &c., &c.

It was further declared, that the persons, who should become purchasers of the said lands so to be sold, should hold the same *discharged from the payment of all manner of tithes*, and other estates, rights, and duties whatsoever, to any person or persons, bodies politic or corporate.

* And in the said act were two clauses, in the words *20 following: "Saving always to the King's most excellent Majesty, his heirs and successors, and to all and every other person and persons, bodies politic or corporate, his, her, and their successors, executors, and administrators, (other than the lord of the manor of Lanchester aforesaid, and all other persons entitled to a right of common in or upon the said moors or commons, his, her, or their heirs, successors, executors, or administrators, respectively, and the person or persons, bodies politic or corporate, his, her, and their heirs, successors, executors, and administrators, who shall by virtue of this act make any claim, affecting the boundaries of the said moors or commons, or any claim of any right of common thereon, which shall be adjudged and determined against him, her, or them, as aforesaid,) all such right, title, and interest, as they, every, or any of them had or enjoyed, of, in, to, or out of the said moors or commons, hereby directed to be divided and inclosed as aforesaid; or could, or might, or ought to have had or enjoyed, in case this act had not been made."

"And be it further enacted, that this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such, by all judges and justices, and other persons whomsoever, without specially pleading the same."

The impropriator of the parish of Lanchester, some years after

(*a*) Riddle *v.* White, 4 Gwill. 1387.

the passing of this act, filed his bill in the Court of Exchequer against certain occupiers of land in the parish, stating that the commissioners under this bill had caused twelve plots of land to be sold, to raise money for defraying the expenses of the bill; that the defendants, who were purchasers thereof, immediately improved their lands, and converted them into arable ground; that the plaintiff, to prevent any doubt which might arise, whether the said lands were to be considered as barren land, and as such exempt from the payment of tithes during seven years, had not during that time required any tithes to be paid to him; that the defendants had, during the preceding years, been the occupiers of the lands which had been so sold, and had grown upon them great quantities of wheat, &c.; and requiring a discovery of the tithe which had arisen during those years; and praying
21* an *account of such tithes, and that the defendants might be decreed to pay the amount thereof to the plaintiff.

To this bill the defendants demurred; for that it appeared by the bill that the lands, which were in the defendants' occupation, were freed and discharged from the payment of all manner of tithes by the said act.

22* *Lord Ch. Baron. "Without going into an elaborate argument in this case, it is sufficient to say, that it falls within all the principles of a contradiction between a saving and an enacting clause, in an act of Parliament; and that the case is exactly the same as that of the Duke of Norfolk, as Alton Woods' case, and in the case in Vernon. The legislature takes it upon itself to alter entirely the mode of tithing
23* all the lands, which *are to be the subject of the inclosure; it is impossible to say that the rector is entitled to his tithes of the land in question, without saying that he would have it in his power to defeat all the purposes of the act, which the legislature never could intend. This case is, in point of principle, precisely the same as the case in Vernon. In private acts, in general, the legislature does nothing more than enable persons to enter into a contract, who could not otherwise enter into it; and the persons, who are parties to the act, are expressly named in it; but here the legislature does a great deal more, it takes on itself to act on the land itself, to declare that it shall be discharged of tithes; accordingly, therefore, to the princi-

ples of the decided cases, and indeed of common sense, we think that the rector cannot claim his tithes, against the express words of the act of Parliament; and that the demurrer must be allowed. (*a*)

49. A private act of Parliament appears to have been formerly considered as an assurance of so high a nature, that although it was obtained by fraud, yet it could not be relieved against by any of the Courts of Law or Equity, but only by the power that made it, that is, by Parliament. Mr. Booth, in the opinion which has been mentioned, lays it down, that inferior jurisdictions are as much bound to submit to a private act of Parliament, as the meanest subject, provided the record be right. They may expound or explain, keeping to the intention of the makers, but not question or impeach what the legislature has thought fit to enact, as an act of Parliament. If there be any grievance or irregularity, that must and can be remedied or rectified only by another act of Parliament. (*b*)

50. Sir W. Blackstone has however said, that *a private act of Parliament has been relieved against, when obtained upon fraudulent suggestions;* and has cited two cases in support of this assertion. The first is Richardson *v.* Hamilton, in which the Court of Chancery set aside an act of the House of Assembly of Pennsylvania. It may be seen in the Book of Decrees for the year 1732, page 344, at the Report Office of the Court of Chancery. The second is a case determined by the House of Lords, on an appeal from the Court of Sessions in Scotland, which shall be here stated from the printed cases. (*c*)

51. Sir James McKenzie, being tenant in tail of an estate in Scotland, called Roystoun, with the concurrence of his only son * George, and of his nephew Sir George McKenzie, *24 the two first remainder-men, obtained a private act to sell the estate for payment of certain debts, which were stated in the act to amount to 51,350 merks Scots, or £2,852 15*s.* 6*d.*; and the act expressly directed that the trustees should, out of the money arising from the sale of the estate, pay off the said sum of 51,350 merks Scots, and lay out the residue of the money in the purchase of other lands, to be entailed as the former ones. (*d*)

(*a*) *Ante*, s. 48.
(*b*) *Ante*, s. 34.
(*c*) 2 Bl. Comm. 346.
(*d*) McKenzie *v.* Stuart, Dom. Proc. 1754.

Sir James McKenzie sold the estate, and prevailed on his son and nephew to consent, that the whole purchase-money should be paid to him without account, in consideration of his laying out £1000 thereof to the uses of the entail; and an agreement, dated the 17th August, 1739, was entered into for that purpose.

It was afterwards discovered, that there were two debts included in the sum stated in the act of Parliament, and in the agreement of the 17th August, as charges on the estate tail, which were in fact fictitious and fraudulent; in consequence of which, Sir George McKenzie, who became entitled to an estate tail in the lands purchased, by the death of Sir James McKenzie, and his son George, brought an action in the Court of Sessions against the representatives of Sir James, and the trustees of the act of Parliament, for an application of the residue of the purchase money, after payment of the just, true, and lawful debts, really affecting the entail, and for an account of what payments had been made.

It was objected, that Sir George was, by the agreement of the 17th August, barred from calling for such an account.

The Lord Ordinary, by an interlocutor, found that "Sir George was not barred, by the agreement, from objecting to the debts, or from proving the same to be fictitious, and not real debts affecting the estate of Roystoun, at the time of the sale;" and granted warrants for letters of incident diligence, for recovering the grounds and instructions of the said debts.

The representatives of Sir James McKenzie pleaded, that the act of Parliament, by reciting these debts as subsisting, and as charges upon the entailed estate, established them as such, was final, and excluded all examination on that head.

To this it was answered, that as to the purchaser of the
25* estate, *and all claiming under him, the act was final and conclusive; but with respect to the debts, it left them as they were. That the act supposed them really and *bonâ fide* due to third persons, who would therefore have right to the purchase money; but if paid, never meant them to be paid a second time; nor Sir James McKenzie, under a pretence thereof, to appropriate to himself the money for discharge of debts, which were either fictitious, or could not from their nature, affect the

entail. And that, whether he had or had not done so, was a question nowise affected by the act.

The interlocutor of the Lord Ordinary was reversed by the Court of Sessions.

Upon an appeal to the House of Lords, it was contended, that the recital of the debts in the act was upon the information and suggestion of the parties. The enacting part, so far as it directed the discharge of those encumbrances out of the purchase-money, only pursued the recital; which, if ill founded, from the misinformation of the parties, was not conclusive; and though the appellant, by having given his consent to the act, might be thought concluded; yet being drawn into such contract by Sir James McKenzie's misrepresentation of the true state of the debts, who misled both the remainder-men and the legislature, he had a right, as against Sir James's representative, to inquire into the reality of the debts, and application of the purchase-money. Nor could a consent, thus fraudulently obtained, any more stand in the way of the relief he sought, than it would in case of an ordinary transaction.

On the other side, it was insisted, that the debts and encumbrances, specified in the act of Parliament, must be taken as they were recited between the parties to the act; for though a saving clause was inserted for the rights of those who were not parties, yet it was a binding law to those who were. The act directed the money, arising by the sale of the lands and barony of Roystoun, to be applied in payment of the debts, the amount of which was particularly stated; and the surplus only was to be laid out in the purchase of lands, to be settled in the order and course of succession provided by the entail.

The House of Lords ordered, that the interlocutor complained of in the appeal, should be reversed; and that the interlocutor of *the Lord Ordinary, should be affirmed; and ordered that the Court of Sessions should proceed thereupon according to justice and the rules of that Court. *26

52. The doctrine, laid down by Sir W. Blackstone, has been confirmed by the following modern case.

53. Simon Biddulph, by his will, made in 1730, devised his real estates, which he had charged with the payment of several sums of money, to trustees, upon trust to raise and pay all such

debts as he should owe at the time of his decease, or so much thereof as his personal estate should not extend to pay; and to settle and assure the residue to his grandson, Theophilus Biddulph for life, without impeachment of waste, remainder to his first and other sons successively in tail, with several remainders over. (*a*)

Simon Biddulph died in 1736, leaving the said Theophilus Biddulph his heir at law, who entered into possession, under the will of Simon Biddulph, of all the estates whereof he died seised; and upon the death of Sir Theophilus Biddulph, of Lapley, in 1743, he became a baronet, and entered into possession of other estates, whereof Simon Biddulph had the reversion, expectant on the death of Sir T. Biddulph of Lapley, which were of considerable value, and charged with the payment of several sums of money; but the rents thereof were sufficient to keep down the interest of the encumbrances affecting the same.

By a private act of Parliament, passed in 27 Geo. II., intituled "An Act for the sale of the settled estates of Sir Theophilus Biddulph, baronet, in the county of Stafford, &c., for raising money to discharge encumbrances affecting the same, and for laying out the surplus in the purchase of other lands, to be settled to the uses therein mentioned;" after reciting the several encumbrances on the said estates, and that the said Sir T. Biddulph had, out of his own money, raised and paid off £2,819 4s., or thereabouts, being the deficiency of the personal estate of Simon Biddulph, in the discharge of the remainder of his debts, which remained due to the said Sir T. Biddulph, and charged on the settled estates, with a considerable arrear of interest; and reciting that it would be for the benefit and advantage of Sir T. Biddulph, and of all the persons claiming under the will of Simon Biddulph, if the encumbrances affecting the settled estates, which carried a high interest, were paid off and discharged,
27 * * which could only be done by sale of part of the settled estates; and therefore the said Sir T. Biddulph and all persons claiming under the will of the said Simon, were desirous and had agreed, that certain parts of the estate should be sold for that purpose, freed and discharged from the said encumbrances; and that the surplus of the money, after payment of the encum-

(*a*) Biddulph *v.* Biddulph, Rep. Office, Book A. 1790, p. 296.

brances, should be laid out in the purchase of other lands, more contiguous to the estate, to be settled to the uses of the will of Simon Biddulph. It was therefore enacted, that the said estates should be vested in trustees, their heirs and assigns, free from the trusts therein mentioned, in trust, with the consent of Sir T. Biddulph, to sell the same, and to apply the money in payment of the encumbrances, *and all interest which should be then due and owing for the same;* and also in payment of the said sum of £2,819 4*s.* due to Sir T. Biddulph, *together with all interest that should have accrued due for the same to the time of the payment thereof;* and to lay out the remainder of the money in the purchase of lands, to be settled to the uses of Simon Biddulph's will.

The trustees, who were named in the act of Parliament did not act, and new trustees were appointed. Sir T. Biddulph himself sold the estates, and paid off the encumbrances, and also paid or took credit to himself for what was due on account of interest; and laid out the residue in the purchase of lands, which he settled to the old uses.

Theophilus Biddulph, the eldest son of Sir T. Biddulph, filed his bill in Chancery against his father, and the trustees, stating the above facts, and that there remained a balance in the hands of the trustees of £7207, which had not been invested in the purchase of lands, according to the directions in the act; and the plaintiff, being entitled to an estate tail, expectant on the estate for life of his father, in the land to be purchased, he prayed that the said sum of £7207, might be laid out in the purchase of lands, to be settled to the old uses.

Sir T. Biddulph, by his answer, admitted that he, acting for the trustees in the act, did, out of the money arising from the sale of the estates, which were sold under the act, pay and apply not only so much as was necessary to discharge the encumbrances affecting the estates, but also all such interest as was due and owing on the said encumbrances, at the respective times when the same were paid off; namely, as well such interest as * was due and owing on the said encumbrances, *28 at the time when the defendant came into possession of the estates, as what afterwards accrued; the same being directed by the act. And submitted, that such payments of interest were respectively made, as being directed by the act; and that there

being such directions in the act for payment of all interest, the defendant, as tenant for life, was not bound to keep down the interest of the encumbrances, from the time he came into possession of the estates; and that the act of Parliament was not a fraud upon the plaintiff and the persons interested in the estates; and that the defendant ought not to make a compensation for such interest, as required by the plaintiff's bill. But admitted, that the rents and profits of the estates, which were charged with the said encumbrances, were more than sufficient to answer the interest of the encumbrances; and said he did not, in suing for and obtaining the act of Parliament, intend any fraud on any of the persons who were to become interested in the said estates after him; and said that the interest which accrued, after he came into possession of the said estates, amounted to £7207; and stated the sums of money paid and laid out in lands; and said there did not remain any money to be invested in land, all the money having been fully and properly applied, pursuant to the directions of the act; and submitted, that he was not compellable to make any compensation for such trust moneys.

Upon hearing counsel, and it being admitted that the said sum of £7207 was received by the said Sir T. Biddulph for rents and profits of the estates in question, of which he was tenant for life, and which ought to have been applied in keeping down the interest of the encumbrances affecting the said estates; and it being admitted, that all the expenses of the act, and all the expenses anterior to the money being laid out in land, had been paid; it was ordered and decreed, that the defendant, Sir T. Biddulph, should pay the sum of £7207 into the bank, in the name of the accountant-general, in trust, in the cause, to be laid out in the purchase of lands, agreeable to the act of Parliament.

NOTE.—As the practice of the American legislatures in regard to private acts is quite unsettled, and far from being uniform, I have thought it expedient to retain, in this edition, the following Standing Orders of the House of Lords, in which estate bills originate, which Mr. White has added to his edition of this work. They will furnish suggestions, at least, for the improvement of our course of legislation on these subjects, which is too often hasty, crude, and without due regard to private rights.

STANDING ORDERS OF THE HOUSE OF LORDS.

20 *April*, 1698.

That, for the future, it be a general instruction to all committees who shall meet

upon private bills, that they take no notice of the *consent* of any person to the passing of such bill, unless such person *appear before them*, or that there be an *affidavit* of two persons made, that he or she is not able to attend, and doth consent to the said bill; and that no committee shall sit upon any such private bill, until *ten days* after it shall have been read a second time.—Emend. 5 June, 1828.

7 *December*, 1699.

95. That, for the future, no private bill shall be brought into this House, until the House be informed of the matters therein contained, by *petition* to this House for leave to bring in such bill.

16 *November*, 1705.

96. That, for the future, no private bill shall be read in this House a second time, until *printed copies* thereof be left with the clerk of the Parliaments, for the perusal of the Lords; and that one of the said *copies* shall be *delivered to every person that shall be concerned* in the said bill, before the meeting of the committee upon such bill; and in case of infancy, to be delivered to the guardian, or next relation of full age, not concerned in interest, or in the passing the said bill.—Emend. 13 May, 1742.

16 *February*, 1705.

98. That, for the future, *all parties concerned* in the consequences of any private bill, shall *sign* the petition that desires leave to bring such private bill into this House.

99. That, when a petition for a private bill shall be offered to this House, it shall be *referred to two of the Judges*, who are forthwith to summon all parties before them who may be concerned in the bill; and after hearing all the parties, and perusing the bill, are to report to the House the state of the case, and their opinion thereupon, under their hands, and are to sign the said bill; the same method to be observed as to private bills that are brought up from the House of Commons, before the second reading of such bills, by sending a copy of the said bill, signed by the clerk, to the Judges.

*101. That in all cases, where trustees shall be appointed by any private bill, the committee, to whom that bill is referred, do take care that the *trustees appear personally* before them, and accept the trusts under their hands; and, also, that the Lord who shall be in the chair of a committee for the passing of any private bills, when he makes his report, shall acquaint the House, that all the orders of the House, in relation to the passing of private bills, were duly observed in passing of the said bill through the committee. *30

102. That, for the future, when any private bill shall be sent by the House to a *committee*, there shall be at the same time transmitted to them a *copy of these orders* now made, and of all other Standing Orders of the House, then in force, relating to the passing of private bills.

18 *December*, 1706.

103. That upon the reference of any private bill to the Judges as aforesaid, the Judges to whom the said bill shall be referred, unless the same shall be referred to the Judges of those parts of the United Kingdom called Scotland or Ireland, shall send to this House a list or lists of such persons' names as are to be sworn in relation to such bill; and that they shall be thereupon *sworn at the bar of this House*, in order to be examined by the Judges, upon such oath, in relation to the bill before them.—Entered, 20 December, 1706.—Emend. 9 December, 1801.

5 *April*, 1707.

34. That, upon all reports, made from committees of amendments to bills, for the

future, the Lord that makes the report do *explain* to the House the effect and coherence of each *amendment;* and that on the clerk's second reading of the same amendments, the Lord on the woolsack do the same.

19 *May*, 1762.

126. That, where a bill is brought in to *empower any person to sell* or dispose of lands, in one place, *and to buy* settle lands, in another place, the committee, to whom such bill shall be referred, do take care that the *values* be fully made out; and if the bill shall not be for making a new purchase, but only for settling other lands in lieu of
31 * those to be sold, in that case provision * shall be made in the bill, that such other lands be settled accordingly; but if the bill shall be to purchase and settle other lands, in that case the committee are to take care that there be a binding agreement produced for such new purchase; or if it shall be made to appear to the committee that such agreement cannot then be made, or that such purchase cannot then be made, and settled, as desired by the bill, and the committee shall be satisfied with the reasons alleged for either of those purposes; in either of those cases, provision shall be made in the bill, that so much of the money, arising by sale of the lands directed to be sold, as is to be laid out in a new purchase, shall be paid by the purchaser or purchasers into the Bank of England, in the name and with the privity of the accountant-general of the High Court of Chancery, to be placed to his account there, *ex parte* the purchaser or purchasers of the estate of the person or persons mentioned in the title of the said bill, pursuant to the method prescribed by the act of 12 Geo. 1, c. 32, and the General Orders of the said Court, and without fee or reward, according to the act of 12 Geo. 2, c. 24, and shall, when so paid in, be laid out in the purchase of Navy or Victualling Bills, or Exchequer Bills; and it is further ordered, that the interest arising from the money so laid out in the said Navy or Victualling Bills, or Exchequer Bills, and the money received for the same, as they shall be respectively paid off by Government, shall be laid out in the name of the said accountant-general in the purchase of other Navy or Victualling Bills, or Exchequer Bills; all which said Navy and Victualling Bills, and Exchequer Bills, shall be deposited in the bank in the name of the said accountant-general, and shall there remain until a proper purchase or purchases be found and approved, as shall be directed by such bill, and until the same shall, upon a petition setting forth such approbation, to be preferred to the Court of Chancery in a summary way by the persons to be named in the bill, be ordered to be sold by the said accountant-general for the completing such purchase, in such manner as the said Court shall think just and direct; and it is further ordered, That if the money arising by the sale of such Navy, Victualling, or Exchequer Bills, shall exceed the amount of the original purchase-money so laid out as aforesaid, then and in that case only the
32 * surplus which shall remain, * after discharging the expense of the applications to the Court, shall be paid to such person or persons respectively as would have been entitled to receive the rents and profits of the lands directed to be purchased, in case the same had been purchased, pursuant to the act, or to the representatives of such person or persons.—Emend. 18 March, 1777; 18 June, 1795.

29 *April*, 1799.

145. That where a petitioner for a private bill is *tenant for life* in possession, and another petitioner for the same bill is *tenant in tail in remainder*, and of age, and where it is competent for the two together, by deed, fine, and common recovery, to bar the rights and interests of all persons in remainder after the estate in tail of the petitioner, the committee shall not, in such case, be required to take the consent of any of the persons in remainder after the estate of such tenant in tail, to the passing of such bill.

146. That, in all private bills, when any *married or unmarried woman*, or when any *widow*, desires to consent to the sale or exchange of any estate in which she may have an interest, or upon which she may be entitled to a jointure or rent charge of any sort, or if she shall desire to sell or otherwise dispose of all or any part of such jointure, rent charge, or interest, the committee shall require not only *her own consent in person*, but also that of *her trustee or trustees*.

147. That, in all private bills, when any estate is proposed to be sold or exchanged, on which the whole or any part of the fortune of any *child* or *children* is secured, or in which any such child or children hath or have an interest, *the committee shall take the consent of any such child or children*, if he, she, or they, is or are *under age*, by his, her, or their *parents or guardians*, and if of age, then the consent of the *trustee or trustees*, for such child or children shall also be taken, as well as the *personal consent* of such party.

148. That *the consent of all trustees shall be required in person* before the committee, where any money is to pass through the hands of any such trustees, whether for jointure, pin-money, the fortunes of younger children, or any other interest whatsoever; but the consent of trustees to preserve contingent remainders only, shall not be necessary.

*149. That when any of the parties interested in any private bill shall have *33
power by such bill to name a trustee in the room of any trustee dying, resigning, or refusing to exercise his trust, provision shall be made in the bill that such *new trustee* shall be appointed by or with the *approbation of the Court of Chancery*.

150. That when a petition shall be presented to the House for any private bill, *notice shall be given* to any person being a *mortgagee* upon the estate intended to be affected by such bill.

151. That in any private *bill for exchanging an estate in settlement*, and substituting another estate in lieu thereof, there shall be annexed to such bill *a schedule* or schedules of such respective estates, showing the *annual rent* and the *annual value thereof*, and also the value of the timber growing thereupon; and in all private bills for selling a settled estate, and purchasing another estate, to be settled to the same uses, there shall be annexed to such bill a schedule or schedules of such estates, specifying the annual rent thereof; and that every such schedule shall be signed and proved upon oath, by a surveyor or other competent person, before the committee to whom such bill shall be referred.

152. That the Lord who shall be in the chair of a committee to whom any private bill shall be committed, shall *state to the House*, when the report of such committee is made, *how far the orders of the House*, in relation to such private bill, have or have not been duly *complied with*.

That these orders shall be transmitted to the committee to whom any private bill shall be referred, for their guidance and instruction.

15 *March*, 1809.

*175. That no private bill, the petition for which shall be referred to two of *36
his Majesty's Judges, shall be read a first time, until *a copy of the said petition*, and of the *report of the Judges thereupon*, shall be delivered by the party or parties concerned to the Lord appointed by this House to take the chair on all committees.—Emend. 8 February, 1825.

7 *May*, 1800.

154. That in any inclosure, road, drainage, paving, dock, or navigation bill, whenever *any sum of money is*, under the provisions of such act, *to be paid for the purchase or exchange* of any lands, tenements, or hereditaments, and which sum of money ought to

be laid out in the purchase of other lands, tenements or hereditaments, to be settled to the same uses, provision shall be made in the said bill that such sum of money, not being less than the sum of two hundred pounds, be *paid into the Bank of England*, in the name and with the privity of the Accountant-General of the Court of Exchequer, to be placed to his account *ex parte* the commissioners under such particular bill, or under such other title as by the said bill shall be directed, pursuant to the method prescribed by the act of the first year of King George the Fourth, chapter thirty-five, and the General Orders of the said Court, and without fee or reward, and shall, when so paid in, there remain until the same shall, by order of the said Court, upon a petition to be preferred to the said Court in a summary way, be applied either in the purchase of land tax, or towards the discharge of any debts or encumbrances affecting the said lands, tenements, and hereditaments, so purchased or exchanged, or until the same shall, upon the like application, be laid out in a summary way, by order of the said Court, in the purchase of other lands, tenements or hereditaments, to be settled to the like uses; and in the meantime, and until such order can be made, such money
37 * may, by order of the said Court, be laid out * in some of the public funds, or in government or real securities, and the dividends or interest arising therefrom, shall, by order of the said Court, be paid to such person or persons as would for the time being, be entitled to the rents and profits of such lands, tenements, and hereditaments so to be purchased, conveyed, and settled: and in case such sum of money shall be less than the sum of two hundred pounds, and shall exceed the sum of twenty pounds, then and in such case such sum of money shall, with the approbation of the commissioners acting under such act, or any three or more of them, be paid into the Bank of England, and applied, by order of the Court of Exchequer, in manner hereinbefore directed, or may without any order of the Court of Exchequer be paid into the hands of two trustees to be nominated by the person or persons who, for the time being, would be entitled to the rents and profits of the lands, tenements, and hereditaments so to be purchased and settled, such nomination to be approved of by three or more of the said commissioners, and such nomination and approbation to be in writing, under the hands of the persons so nominating and approving; and the money so paid to such trustees, shall by them be applied in like manner as is before directed with respect to the money so to be paid into the bank in the name of the Accountant-General of the Court of Exchequer, but without any order of the said Court touching the application thereof. And in case such sum of money shall not exceed twenty pounds, then the same shall be paid to the person or persons who for the time being would be entitled to the rents and profits of the lands, tenements, and hereditaments so to be purchased and conveyed, for his, her, or their own use and benefit. And it is hereby further ordered, that if any commissioner in an inclosure or drainage bill, shall find any difficulty in obtaining a purchase in land which may be equal in value to such sum of money not exceeding two hundred pounds, as by the said Standing Order is directed to be paid into the bank, to await a future purchase, or which purchase may be disadvantageous in other respects, such commissioners shall be at liberty to apply such sum of money towards the expenses of such act, so far as the proportion of the party entitled to such sum, shall amount to; and if there shall be any surplus of such two hundred pounds, they may apply such surplus, after such application, in diminution
38 * of the sum allowed to * be charged upon the estate for the purpose of inclosure or drainage.—Emend. 7 July, 1823.

6 *July*, 1813.

183. That no bill for making any *cut, canal, or aqueduct*, for the purpose of supplying any city, town, or place with water, or for making, extending, or *improving the navigation of any river*, or for *making any canal* for the purpose of navigation, or for making

any *railway or tram-road*, or any *tunnel or archway*, or any *bridge, ferry, dock, pier, port, or harbor*, or any *turnpike-road*, or for varying or altering any such cut, canal, or aqueduct, railway or tram-road, tunnel or archway, bridge, ferry, dock, pier, port, or harbor, or any turnpike-road already made, or for *altering any act of Parliament passed for any or either of those purposes*, by increasing or *altering any tolls or duties*, or by altering, extending, or diminishing any works mentioned in such act, shall be read a third time in this House, unless *notice that an application was intended to be made to Parliament* to obtain such bill, shall be *inserted in some one newspaper* of every county in or through which any such cut, canal, or aqueduct, railway or tram-road, tunnel or archway, bridge, ferry, dock, pier, port, or harbor, or any turnpike-road, is intended to be made or carried, or in which any such cut, canal, or aqueduct, railway or tram-road, tunnel or archway, bridge, ferry, dock, pier, port, or harbor, or any turnpike-road, already made and intended to be varied or altered, shall be, or in which such river, or such part thereof as is intended to be made navigable, or the navigation thereof to be extended or improved, is situated, (or if there be not any newspaper printed in such counties respectively, then in the newspaper of some county adjoining thereto,) three times at the least, in the months of August, September, October, and November, or any of them, immediately preceding the session of Parliament in which such application is intended to be made: *and unless such notice* as to all such bills as aforesaid, except turnpike bills, *shall also have been given at the general quarter session of the peace* which shall have been holden for every and each county, riding, or division in or through which any such cut, canal, or aqueduct, railway or tram-road, tunnel or archway, bridge, ferry, dock, pier, port, or harbor, is intended to be made or carried, or in which such cut, canal, or aqueduct, railway or tram-road, tunnel or archway, bridge, ferry, dock, *pier, port, or harbor, * 39
already made, and intended to be varied or altered, shall be, or in which such river, or such part thereof as is intended to be made navigable, or the navigation thereof to be extended or improved, is situated, at Michaelmas or Epiphany preceding the session of Parliament in which such application is intended to be made, by *affixing such notice on the door of the session-house* of each and every such county, riding, or division, where such general quarter session shall be holden; save and except as to any bill for any of the above purposes in Scotland, (excepting turnpike-roads,) or for the building or repairing any gaol or house of correction in Scotland, or for continuing or amending any act of Parliament passed for such purposes, or for the increase or alteration of the existing tolls, rates, or duties for such purposes; in which case, instead of affixing such notice on the door of the session-house, such notice shall be written or printed upon paper, and affixed to the church door of the parish or parishes in or through which the work or purpose in view is to be made or carried, for three Sundays in the months of August, September, October, or November, or any of them, immediately preceding the session of Parliament in which such application is intended to be made. —Emend. 17 June, 1814; 24 June, 1824; 30 June, 1825; 19 June, 1829; 26 August, 1833.

184. That such several notices shall *contain the names* of the parishes and townships in, to, or through which any such cut, canal, or aqueduct, railway or tram-road, tunnel or archway, bridge, ferry, dock, pier, port, or harbor, or turnpike-road is intended to be made, carried, varied, or altered, or in which such river, or such part thereof as is intended to be made navigable, or the navigation thereof to be extended or improved, is situated.

185. That no bill for all or any of the purposes aforesaid, except turnpike-roads, shall be read a third time in this House, unless, previously to such bill being brought to this House from the Commons, *a map or plan of such intended cut or canal, aqueduct or navigation, railway or tram-road, tunnel or archway, bridge, ferry, dock, pier, port or harbor,*

or of any *intended extension or alteration* in any cut, canal, aqueduct or navigation, railway, or tram-road, tunnel or archway, bridge, ferry, dock, pier, port, or harbor already made, (as the case may be,) and of the several lands from which any *streams of water* shall be intended to be taken for the use of any such cut, canal, aqueduct, or
40 * navigation, * shall have been deposited with the clerk of the Parliaments, in which map or plan shall be described the line of such intended cut, canal, aqueduct or navigation, railway or tram-road, tunnel, or archway, bridge, ferry, dock, pier, port, or harbor, or of such intended alteration, and the lands through which the same is intended to be carried, or from which any streams of water are intended to be taken, together with the book of reference, containing a list of the names of the owners or reputed owners, and also of the occupiers of such lands respectively; and that there be also annexed to the said map or plan, an estimate of the expense of such undertaking, (in cases where provision is intended to be made for raising money to defray such expense,) such estimate to be signed by the person or persons making the same; and if such money is proposed to be raised by subscription, that there be also annexed to the said map or plan an account of the money subscribed for that purpose, and the names of the subscribers, with the sums by them subscribed respectively; and there shall also be annexed to such map or plan an estimate of the probable time within which the whole of such work may be completed, if not prevented by inevitable accident.

186. That previous to the second reading in this House of any bill for making any navigation, aqueduct, cut or canal, railway or tram-road, tunnel or archway, bridge, ferry, dock, pier, port, or harbor, or for improving the same, *the map or plan* of the said navigation, aqueduct, cut or canal, railway or tram-road, tunnel or archway, bridge, ferry, dock, pier, port or harbor, which is directed to be lodged in the Parliament Office as before mentioned, *shall be engraved or printed upon the scale of an inch at least to a mile*, and *annexed to the printed copies of the bill*, and shall be laid upon the table of this House.

187. That no bill for all or any of the purposes aforesaid, except turnpike-roads, shall be read a third time in this House, unless previously to such bill being brought to this House from the Commons, *application shall have been made to the owners or reputed owners, and also to the occupiers of the lands* in or through which any such cut, canal, aqueduct, or navigation, railway or tram-road, tunnel or archway, bridge, ferry, dock, pier, port, or harbor, is intended to be made or carried, or any such alteration is intend-
ed to be made, *for the consent of such persons respectively*; and unless *such map or*
41 * *plan* as aforesaid, or a * duplicate thereof, shall at the time of such application have been *shown to them* respectively; and unless *separate lists* shall have been made of the names of such *owners and occupiers*, distinguishing which of them, upon such application, have assented to or dissented from such intended cut, canal, aqueduct, or navigation, railway or tram-road, tunnel or archway, bridge, ferry, dock, pier, port, or harbor, or such alteration, or are neuter in respect thereof, and unless such list shall be *deposited with the clerk of the Parliaments* at the same time as the map or plan and book of reference mentioned in the Standing Order, No. 185.

188. That in case any bill for all or any of the purposes aforesaid, except turnpike-roads, shall contain a clause to empower the persons who shall make such cut, canal, aqueduct or navigation, railway, or tram-road, tunnel or archway, bridge, ferry, dock, pier, port, or harbor as aforesaid, or any part thereof, *to vary or deviate from the line particularly described in the map or plan* deposited as aforesaid with the clerk of the Parliaments, such bill shall not be read a third time in this House, unless a like application shall have been made to the owners or reputed owners and occupiers of the lands through which such cut, canal, aqueduct or navigation, railway or tram-road, tunnel or archway, bridge, ferry, dock, pier, port or harbor, might pass by virtue of the power so

given to alter or vary the line thereof; and unless a like list as aforesaid, of such owners or reputed owners and occupiers be deposited at the time and in the manner aforesaid with the clerk of the Parliaments, as if it had been originally proposed to carry such cut, canal, aqueduct or navigation, railway or tram-road, tunnel or archway, bridge, ferry, dock, pier, port, or harbor, through the lands of such persons respectively.

189. That no bill for making or *improving any navigation,* aqueduct, cut or canal, shall be read a third time in this House, unless *previously* to such bill being brought to this House from the Commons, *application shall have been made to the owners* or reputed owners and also *to the occupiers* of lands, streams, and mills, from which any water shall by such bill be proposed to be taken for the purposes of such navigation, aqueduct, cut or canal, to the prejudice of such owners or reputed owners or occupiers of such lands, streams, and mills respectively.

190. That no bill for any *turnpike road,* whereby power shall be given to make a new road, or to alter or vary the line of road *before used, for any space ex- *42
ceeding one hundred yards, shall be read a third time in this House, unless, previously to such bill being brought to this House from the Commons, *a map or plan of such intended new road,* or of any *intended alteration* in any road already made, (as the case may be,) shall have been *deposited with the clerk* of the Parliaments; in which map or plan shall be described the *line of such intended new road,* or of such intended alteration, and the lands through which the same is intended to be carried, together with a *book of reference,* containing a *list of the names of the owners or reputed owners,* and also the *occupiers* of such lands respectively; and that there be also annexed to the said map or plan *an estimate of the expense* of such undertaking (in cases where provision is intended to be made for raising money to defray such expense,) such estimate to be signed by the person or persons making the same; and if such money is proposed to be raised *by subscription,* that there be also annexed to the said map or plan an *account of the money subscribed* for that purpose, and the *names of the subscribers,* with the sums by them subscribed respectively; and there shall also be annexed to such map or plan an *estimate of the probable time* within which the whole of such work may be completed, if not prevented by inevitable accident.

191. That no bill for any such purposes as aforesaid, except turnpike-roads, shall be read a third time in this House, unless there shall be contained therein a provision, that in case the work intended to be carried into effect under the authority of such bill shall not have been completed, so as to answer the objects of such bill within *a time to be limited by such bill,* all the powers and authorities given by such bill shall thenceforth cease and determine, save only as to so much of such work as shall have been completed within such time, with such provisions and qualifications as the nature of the case shall require.

192. That no bill for any such purposes, except turnpike-roads, shall be read a third time in this House, unless *four fifths of the probable expense of the proposed work shall have been subscribed by persons under a contract binding the subscribers,* their heirs, executors, and administrators, *for payment of the money so subscribed within a limited time;* nor unless there shall be contained in such bill a provision that the *whole of the probable expense* of such works *shall be subscribed* in like manner before the *powers and *43
authorities to be given by such bill shall be put in force.

193. That no such bill for any cut, canal, or aqueduct, which shall *cross any public road,* shall be read a third time in this House, unless there shall be contained therein a provision that the *assent* to every bridge to be made over such cut, canal or aqueduct, for the purpose of such public road, shall *not be more than one foot in thirteen,* and that the *fence on each side of such bridge shall not be less than four feet* above the surface of the bridge.

2 *June*, 1824.

219. That in future, with the exception of bills for making or improving any turnpike-road, navigation, aqueduct, cut or canal, railway or tram-road, tunnel or archway, bridge, ferry, dock, pier, port or harbor, wharf, stairs, or landing-place, and of bills for lighting, paving, or watching any one town, parish, or district, or for therein erecting or improving any market-place or market-house, or for the cultivation and improvement of waste lands, all bills brought into this House enacting and declaring that certain persons shall form a *body politic and corporate*, who shall only be bound to the extent of their respective shares, or granting to the same the privilege of a perpetual succession and a common seal, or the right of suing and being sued, pleading and being impleaded, at law or in equity, or of prosecuting any person who shall commit any felony, misdemeanor, or other offence, or any bill conveying to any number of persons who are not bound conjointly and severally to the extent of their respective fortunes one or more of the aforesaid privileges; such bill, after being read a first time, shall be referred to a select committee; and that no such bill shall be read a second time till the committee to which it is referred have reported that it has to them been proved, in a satisfactory manner, that *three fourths of the capital intended to form the joint stock of such company is deposited in the Bank of England*, or *vested in exchequer bills*, or in the *public funds*, *in the name of trustees*, to be transferred to such company when they are by law constituted a body politic and corporate, or have by law acquired any of the aforesaid privileges.—Emend. 29 March, 1830.

211. That in future, when any bill shall be brought into this House, *granting* and enacting, in favor of *any body politic and corporate*, previously constituted such
44* by royal charter, and who * are not bound conjointly and severally to the extent of their respective fortunes, *further privileges;* such bill, if not intended to effect the objects specially excepted in the former motion, after being read a first time, shall be referred to a select committee; and that no such bill shall be read a second time until the committee to which it is referred have reported that it has to them been proved, in a satisfactory manner, that three fourths of the capital intended to form the joint stock of such company has been paid up by the individual proprietors.

1 *June*, 1829.

213. That no bill *to empower any company* already constituted by act of Parliament, *to execute any work other than that for which it was originally established*, shall be read a third time in this House, unless the committee on the bill shall have specially reported,

1st. That a draft of the proposed bill was submitted to a meeting of the proprietors of such company at a meeting held specially for that purpose:

2d. That such meeting was called by advertisement inserted for four consecutive weeks in the newspapers of the county or counties wherein such new works were proposed to be executed; or if there are no newspapers published in such county or counties, then in that of the nearest county wherein a newspaper is published:

3d. That such meeting was held on a period not earlier than seven days after the last insertion of such advertisement:

4th. That at such meeting the draft of the proposed bill was submitted to the proprietors then present, and was approved of by at least three fifths of such proprietors.

That in case any proprietor of such company, or any person authorized to act for him in that behalf, shall at such meeting as aforesaid have dissented, such proprietor shall be permitted, on petitioning the House, to be heard by the committee on the proposed bill, by himself, his counsel, or agents.]

TITLE XXXIV.

KING'S GRANT.

SECT. 1. *Nature of.*
7. *Grants of Franchises.*
9. *Of Offices.*
10. *Of Crown Lands.*
11. *How King's Grants are construed.*
15. *What passes by general words.*
28. *Where the King is deceived.*
29. *Exceptions.*

SECTION 1. The *second kind* of assurance by matter of record, is a *grant from the King to a subject;* for it is a rule of the common law, that the King can only give by matter of record; therefore the King's grants are contained in charters, or letters-patent under the great seal, which are usually directed or addressed to all the King's subjects. (*a*)

2. Lord Coke says, that where the King's grants concluded with the words *his testibus*, they were called *chartæ*, or *charters;* and where they concluded with the words *teste me ipso*, they were called *letters-patent*, being so named in the clause—*In cujus rei testimonium has literas nostras fieri fecimus patentes.* (*b*)

3. The King's *letters-patent* under the great seal of England, *need no delivery;* nor his grants under the great seal of the duchy of Lancaster; for they are sufficiently authenticated and completed by the annexing of the respective seals to them.[1]

(*a*) Bro. Ab. tit. Prerog. pl. 71.

(*b*) 2 Inst. 78.

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[1] If a grant has once passed the great seal, it cannot be revoked, unless by some legal proceeding. Duncan *v.* Beard, 2 N. & M'C. 400. Every grant of land, issued in the form prescribed by law, is presumed to be valid; and the burden of impeaching it is devolved on the objector. Patterson *v.* Jenks, 2 Pet. 216. The validity of such a grant cannot be inquired into, in a collateral issue; nor can a party travel behind a patent, in order to avoid it. Jennings *v.* Whitaker, 4 Monr. 50; Bear Camp R. Co. *v.* Woodman, 2 Greenl. 404. If not void on its face, it is not to be collaterally impeached, Masters *v.* Eastis, 3 Port. 368, unless it issued without authority, or contrary to the prohibitions of law. Jackson *v.* Marsh, 6 Cowen, 281; Richardson *v.* Hobart, 1 Stew. 500; Stoddard *v.* Chambers, 2 How. S. C. R. 284; Barry *v.* Gamble, 8 Mis. R. 88; Hunter *v.* Hemphill, 6 Mis. R. 106.

4. There are a variety of offices, communicating in a regular subordination with one another, through which all the King's grants must pass, and be transcribed and enrolled, in order that they may be narrowly inspected by his officers, who will inform him if any thing contained therein be improper, or unlawful to be granted. (*a*)

46* *5. By the statute 13 Eliz. c. 6, it is enacted, that an exemplification of the enrolment of any letters-patent, granted from the 4th February, 27 Hen. VIII., or thereafter to be granted, shall be of as good force, to be shown and pleaded in behalf of the patentees, their heirs and assigns, and every other person having any estates from them, as if the letters-patent themselves were produced. (*b*)

6. It will only be necessary here to treat of those grants, by which the Crown gives something that falls within the description of real property, such as franchises, offices, and lands. (*c*)

7. It has been stated in a former title, that all *franchises* in the hands of private persons, are derived from grants of the Crown; but that ancient grants of franchises are not sufficient, without an allowance of them before Justices in eyre. (*d*)

8. The Crown may still grant fairs, markets, parks, warrens,

(*a*) 2 Bl. Comm. 346.
(*b*) Page's case, 5 Rep. 52. Stat. 10 Ann. c. 18.
(*c*) Tit. 26.
(*d*) Tit. 27.

The seal of the Treasury Department of the United States, also, is a sufficient authentication of a written contract for the sale of public lands, entitling it to be read, without further proof. Jenkins *v.* Noel, 3 Stew. 60. So is a copy of the contract, under the same seal, and certified by the Secretary of the Treasury. Ibid. 1 Greenl. Evid. § 484, 485.

A patent for land, granted by one of the United States, is one of those "public acts" to which every other State is bound, by the Constitution, to give full faith and credit; and its validity cannot collaterally be drawn in question, in the Courts of any other State, upon the ground of its being a forgery. Lassly *v.* Fontaine, 4 H. & M. 146; 1 Greenl. Evid. § 504–507, 548.

The State is not subject to the imputation of fraud, in its grant; nor liable to an estoppel; nor does its grant imply a warranty of title. Elmandorff *v.* Carmichael, 3 Lit. 472. Thus, if two patents for the same land be successively issued, to several persons, and the elder grant escheats to the State, the title thus acquired by the State does not enure to the junior grantee; but the State may lawfully convey a valid title to a stranger. Ibid.

Estates granted by the government upon condition subsequent, are, upon breach of the condition, immediately devested from the grantee and revested in the government, without entry or other act of claim. Kennedy *v.* M'Cartney, 4 Port. 141.

&c., though I apprehend that no grants of parks, warrens, or free chase, have been made for the last two centuries.

9. There are a variety of *offices* held immediately under the Crown, which can only be granted by letters-patent. And it has been stated in a former title, that each of these offices must be granted with all its ancient rights and privileges, and every thing incident to it. (*a*)

10. It is somewhat doubtful, whether our Kings were formerly enabled to aliene the *Crown lands*; for although the Conqueror and his sons granted away great estates to their followers, yet these were in general forfeitures that had accrued to the Crown. In process of time, however, our Kings certainly exercised the right of granting the Crown lands at their pleasure. But the exercise of this prerogative, having greatly impoverished the Crown, it has been restrained by several modern laws. (*b*) [1]

(*a*) Tit. 25. (*b*) Banker's case, 5 Mod. 29.

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[1] In representative governments, like those of the United States, it is obvious that the power of the legislature to aliene the public lands, in such modes, and on such terms and conditions as may be thought proper, is incapable of restriction, unless by constitutional provisions. Patterson *v.* Trabue, 3 J. J. Marsh. 598.

When lands are thus granted, whether by legislative resolve, as has been the practice in some States, or by deed, executed by the Land Agent, or other public officer, pursuant to law, or by letters-patent, as in others, the grant itself is equivalent to a conveyance with livery of seisin. Enfield *v.* Permit, 8 N. Hamp. 512; Enfield *v.* Day, 11 N. Hamp. 520. But if part of the land described has been previously granted to another person, the junior grant or patent is valid for the land not covered by the elder title, and void only as to the residue. Patterson *v.* Jenks, 2 Pet. 216.

The reservation of a certain proportion of the land, for public uses, as, for example, for glebe-lands, or schools, or the like, in a grant of lands by the State, is in effect a grant upon condition subsequent, imposing upon the grantees the duty of impartially setting apart the quantity so reserved, for the designated uses. When the lands are thus specifically set apart in severalty, by an authoritative and legal act of the grantees, the fee vests in the town, parish, or other body or person, for whose benefit the reservation was made, if then in being, and capable of taking the estate. Until then, it is provisionally in the grantees and their heirs. Porter *v.* Griswold, 6 Greenl. 430; Shapleigh *v.* Pilsbury, 1 Greenl. 271. Such grant, whether upon condition precedent or subsequent, is assignable; and the title of the assignee is good against all persons, except the State. Jenkins *v.* Noel, 3 Stew. 60.

In the construction of public grants of land, founded upon entries made pursuant to law, in the proper office, by the locator, his main intention, manifested by the language of the entry, will be carried out; and if there be any calls, repugnant to each other, those will be rejected which go to defeat that intention. Croghan *v.* Nelson, 3 How. S. C. R. 187. The misnomer of the county, in which the land lies, will not vacate the patent. Stringer *v.* Young, 3 Pet. 320. For the method of obtaining patents of public

53 * *11. The *King's grants* are construed in a very different manner from conveyances made between private subjects; for, being matter of record, they ought to contain the utmost truth and certainty; and as they chiefly proceed from the bounty of the Crown, they have at all times been *construed most favorably for the King*, and *against the grantee;* contrary to the manner in which all other assurances are construed. (*a*) [1]

(*a*) Plowd. 243.

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lands in Virginia, which, in its main features, has been followed in several of the Western States, the student is referred to 2 Lomax, Dig. 378–389.

[1] It is now well settled, that, in a grant by the State, nothing passes by implication. Where a corporation is created, all well-known and essential corporate powers are, *ex vi termini*, granted; which is only saying, in other words, that the creation of a corporation involves the creation of all its essential functions. But a grant of property or privileges is restricted to the things expressed in the grant. Thus, the grant of the franchise of a toll-bridge, turnpike, or ferry, is to be restricted to the line of travel between the particular *termini*, and does not extend laterally, on either side, to the exclusion of another franchise, granted subsequently, between other *termini*. This point was profoundly considered, and so decided, in the case of The Charles River Bridge Corp. *v.* The Warren Bridge Corp. 11 Pet. 420, in which an injunction was prayed for, to prevent the defendants from erecting and maintaining a free bridge over Charles River, between the cities of Boston and Charlestown, and within a few rods of the plaintiffs' bridge; both parties claiming under charters granted by the State, of which the charter of the plaintiffs was the eldest, by some forty years. The opinion of the Court, upon this point, was delivered by Taney, C. J., in the following terms:—

"Much has been said, in the argument, of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the State, may be implied. The Court think there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England, and by the decisions of our own tribunals. In 2 Barn. & Adol. 793, in the case of the Proprietors of the Stourbridge Canal against Wheely and others, the Court say, 'The canal having been made under an act of Parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction, in all such cases, is now fully established to be this; that any ambiguity in the terms of the contract, must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act.' And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one, as could well be imagined, for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants, to a very considerable extent, in transporting large quantities of coal. The rights of all persons to navigate the canal, were expressly secured by the act of Parliament; so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks; and the statute, in giving the right to exact toll, had

[And the introduction of the words *ex mero motu & ex certâ scientiâ*, will not reduce a royal grant to the same standard of construction as the grant of a subject.] (*a*)

(*a*) Rex *v.* Capper, 5 Price, 217.

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given it for articles which passed "*through any one or more of the locks*," and had said nothing as to toll for navigating one of the levels; the court held that the right to demand toll, in the latter case, could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant; if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors, and used the canal freely and extensively for their own profit. Still the right to exact toll could not be implied, because such a privilege was not found in the charter.

"Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there any thing in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation, a rule of construction differing from that of the English law, and, by implication, make the terms of a charter in one of the States, more unfavorable to the public, than upon an act of parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle; and for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging these privileges by implication, and construing a statute more unfavorably to the public, and to the rights of the community, than would be done in a like case in an English court of justice.

"But we are not now left to determine, for the first time, the rules by which public grants are to be construed in this country. The subject has already been considered in this Court; and the rule of construction, above stated, fully established. In the case of The United States *v.* Arredondo, 8 Pet. 738, the leading cases upon this subject are collected together by the learned Judge who delivered the opinion of the Court; and the principle recognized, that in grants by the public, nothing passes by implication.

"The rule is still more clearly and plainly stated in the case of Jackson *v.* Lamphire, in 3 Pet. 289. That was a grant of land by the State; and in speaking of this doctrine of implied covenants in grants by the State, the Court use the following language, which is strikingly applicable to the case at bar:—'The only contract made by the State, is the grant to John Cornelius, his heirs and assigns, of the land in question. The patent contains no covenant to do, or not to do any further act in relation to the land; and we do not feel ourselves at liberty, in this case, to create one by implication. The State has not, by this act, impaired the force of the grant; it does not profess or attempt to take the land from the assigns of Cornelius, and give it to one not claiming under him; neither does the award produce that effect; the grant remains in full force; the property conveyed is held by his grantee, and the State asserts no claim to it.'

12. Thus, if the King grants lands, or a rent issuing out of them, to A. B., without any limitation of estate, the grantee will

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"The same rule of construction is also stated in the case of Beatty *v.* The Lessee of Knowles, 4 Pet. 168; decided in this Court in 1830. In delivering their opinion in that case, the Court say:—'That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it, will not be denied. The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation.'

"But the case most analogous to this, and in which the question came more directly before the Court, is the case of The Providence Bank *v.* Billings & Pittmann, 4 Pet. 514; and which was decided in 1830. In that case, it appeared that the legislature of Rhode Island had chartered the bank, in the usual form of such acts of incorporation. The charter contained no stipulation on the part of the State, that it would not impose a tax on the bank, nor any reservation of the right to do so. It was silent on this point. Afterwards, a law was passed, imposing a tax on all banks in the State; and the right to impose this tax was resisted by the Providence Bank, upon the ground, that if the State could impose a tax, it might tax so heavily as to render the franchise of no value, and destroy the institution; that the charter was a contract, and that a power, which may in effect destroy the charter, is inconsistent with it, and is impliedly renounced by granting it. But the Court said that the taxing power was of vital importance, and essential to the existence of government; and that the relinquishment of such a power is never to be assumed. And in delivering the opinion of the Court, the late Chief Justice states the principle, in the following clear and emphatic language. Speaking of the taxing power, he says, 'as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear.' The case now before the Court, is, in principle, precisely the same. It is a charter from a State. The act of incorporation is silent in relation to the contested power. The argument in favor of the proprietors of the Charles River Bridge, is the same, almost in words, with that used by the Providence Bank; that is, that the power claimed by the State, if it exists, may be so used as to destroy the value of the franchise they have granted to the corporation. The argument must receive the same answer; and the fact that the power has been already exercised so as to destroy the value of the franchise, cannot in any degree affect the principle. The existence of the power does not, and cannot depend upon the circumstance of its having been exercised or not.

"It may, perhaps, be said, that, in the case of the Providence Bank, this Court were speaking of the taxing power; which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade; and are essential to the comfort, convenience, and prosperity of the people. A State ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges that a State has surrendered for seventy years, its power of improvement and public accommodation, in

only take an estate at will, on account of the uncertainty; whereas, in the case of a grant by a subject, an estate for life would have passed. (*a*)

(*a*) Tit. 32, c. 19.

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a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this Court above quoted, 'that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it, does not appear.' The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the Court, was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question that the interests of the great body of the people of the State, would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll, and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation."

"And what would be the fruits of this doctrine of implied contracts on the part of the States, and of property in a line of travel by a corporation, if it should now be sanctioned by this Court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it, in the various acts which have been passed, within the last forty years, for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case, have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach without invading its rights in the privileged line? If this Court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies; and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling, and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this Court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied; and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world. Nor is this all. This Court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property

13. King Henry VIII. granted lands to Lord Lovel, to have and to hold to him and to his heirs male; and it was adjudged void; for the King could not grant such a state of inheritance in fee simple, to make the males to be inheritable, and exclude the females. But in the case of a private person, such a grant would have passed an estate in fee simple. (*a*)

14. The King's grant shall not be taken to a double intent. Thus, if the King grants lands, and the mines therein contained, it will only pass common mines, and not mines of gold or silver; for the common intent of the grant is satisfied by the passing of mines of coal, lead, &c. (*b*)

(*a*) 1 Rep. 43 b. Tit. 23, c. 22. (*b*) Case of Mines, Plowd. 336. 1 Rep. 46 b, 52 a.

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exists, we have no lights to guide us in marking out its extent, unless, indeed, we resort to the old feudal grants, and to the exclusive rights of ferries, by prescription, between towns; and are prepared to decide, that, when a turnpike road from one town to another had been made, no railroad or canal, between these two points, could afterwards be established. This Court are not prepared to sanction principles which must lead to such results." See 11 Pet. 544–548, 552, 553. See also Rex *v.* Abbot of Reading, 39 E. 3, 21; Ford & Sheldon's case, 12 Rep. 2; Chancellor, &c. of Cambridge *v.* Walgrave, Hob. 126; Stanhope *v.* Bp. of Lincoln, Ibid. 243; Case of Customs, Dav. 45; Atto.-Gen. *v.* Farmer, 2 Lev. 171; T. Raym. 241; Finch, L. 100; Blankley *v.* Winstanley, 3 T. R. 379; Parmenter *v.* Gibbs, 10 Price, 456; Leeds, &c. Can. *v.* Hustler, 1 B. & C. 424; Dock Co. *v.* La Marche, 8 B. & C. 42; The Elsebe, 5 Rob. 155, 163; The Joseph, 1 Gall. 555; Jackson *v.* Reeves, 3 Caines, 303, 306; Wilkinson *v.* Leland, 2 Pet. 657; Lansing *v.* Smith, 4 Wend. 9; in addition to the cases cited in the text. Also, *ante*, tit. 27, § 29, note; 1 Kent, Comm. 460, note (*b*.)

In Mills *v.* St. Clair Co. 8 How. S. C. R. 569, the Court laid down the following rules for construing public grants by statute: 1. In a grant, designed, by the sovereign power making it, to be a general benefit and accommodation to the public, if the meaning of the words be doubtful, they shall be taken most strongly against the grantee, and for the government; and therefore should not be extended by implication in favor of the grantee, beyond the natural and obvious meaning of the words employed; and if these do not support the right claimed, it must fall. 2. If the grant admits of two interpretations, one of which is more extended, and the other more restricted, so that a choice is fairly open, and either may be adopted without any apparent violation of the apparent objects of the grant; if in such case, one interpretation would render the grant inoperative, and the other would give it force and effect, the latter, if within a reasonable construction of the terms employed, should be adopted. Therefore, where, in the year 1819, the legislature of Illinois authorized S. W. to establish a ferry on the east bank of the Mississippi, and to run the same from lands "that may belong to him," provided the ferry be put in operation within eighteen months; and at that time he had no land, but acquired an interest in a tract of one hundred acres within the eighteen months; and in 1821, by another act, he was authorized to remove the ferry "on any land that may belong to him," on the river, under the privileges granted by the former act; it was *held*, that the words of the latter act must be construed to the land *then* belonging to him; and not to lands which he subsequently purchased.

15. By the statute called *Prerogativa Regis*, 17 Edw. II. c. 15, it is declared, that, when the King gives or grants lands or manors, with the appurtenances, unless he makes *express mention* *in the deed of the knights' fees, advowsons of *54 churches, and dowers, when they fall, then the King reserves to himself such fees, &c., although among other persons it had been observed otherwise. (*a*)

16. It has been held that this act is restrained to the three cases of advowsons, knights' fees, and dower; for a court-leet will pass without express words. So, of a forest appendant to a manor; and the words of the act, being *quando dominus rex dat vel concedit*, in cases of restitution, advowsons, &c., will pass without any express mention of them. (*b*)

17. When the grant of the King, in general terms, *refers to a certainty*, it is the same as if the certainty had been expressed in the grant; though such certainty be not of record, but lie in averment, by matter in *pais* or in fact.

18. Queen Elizabeth, being seised in fee *jure coronæ* of the manor of Whitchurch, to which an advowson was appendant, granted the manor, with the appurtenances, for twenty-one years, excepting the advowson; and afterwards, reciting the said demise and exception, she made another grant to the same grantee, for another term of years, with the like exception. King James I., in consideration of services, *ex certâ scientiâ, &c.*, granted the manor, *cum suis juribus, &c.*, to G. H., *exceptis quæ in eisdem literis patentibus excipiuntur;* and mentions the lease in reversion, and the like exception therein; but then follows this clause:—*Et ulterius de uberiori gratia nostra, et ex certa scientia, &c., damus omnia et singula tenementa prædicto manerio quoque modo spect. &c., et uberius damus, &c.*, to the said G. H. and his heirs, the said manor, *ac cætera omnia et singula præmissa, cum eorum pertinentiis adeo plene, &c.*, as the same came to him, and they were in his hands. It was resolved, I. That the advowson passed, because it was clearly referred to in the grant. II. That if the words *adeo plene et integre* had been omitted, then it would not have passed by the first clause; but by the addition of the last clause, all the parts of the patent taking effect at one and the same time, the advowson should pass as appendant. III. Though

(*a*) 10 Rep. 64 a. (*b*) *Idem.*

the first clause of the grant referred to the demise in which the advowson was excepted, yet by the middle clause, all tenements, &c., pertaining to the said manor, were granted; and the last clause granted the manor, with the appurtenances, &c., *adeo plene, &c.* (*a*)

55* *19. The manor of Laburn, to which an advowson was appendant, came to King Hen. VIII. by the dissolution of the monasteries, who granted the manor to the Archbishop of Canterbury, excepting the advowson; and afterwards the archbishop regranted the same to the King, together with the advowson; and then the King granted the manor of Laburn, *et advocationem ecclesiæ de Laburn dicto archiepiscopo dudum spect.*, and which was re-granted to the said King by the said archbishop, and formerly belonging to the abbot of Grey Church, &c., *adeo plene* as the said archbishop or abbot had it, or as it was in our hands, by any ways or means howsoever. The question was, whether the advowson passed by this grant. (*b*)

Ellis, Just., said, the general words *adeo plene*, as the King had it by any ways or means whatsoever, were sufficient to pass it; and judgment was given accordingly. (*c*)

20. But where general words *do not refer to any certainty*, they will not, in grants by the Crown, pass any thing.

21. In the River Banne, in Ulster, where the stream is navigable, there is a rich fishery of salmon, which was parcel of the ancient inheritance of the Crown. In the first year of King James I., Sir Randall Macdonnell obtained a grant to him and his heirs, by letters-patent, of the territory of Rout, which is adjoining to the River Banne, in that part where the fishery is; by these the King granted to him, *omnia castra, messuagia, tofta, molendina, terras, prata, pascua, piscarias, piscationes, aquas, aquarum cursus, &c., ac omnia alia hæreditamenta in vel infra dictum territorium de Rout, exceptis et ex hac concessione nobis hæredibus et successoribus nostris reservatis, tribus partibus piscationis fluminis de Banne.* (*d*)

It was resolved, by the Judges of Ireland, that no part of the
2 fishery passed by these letters-patent; that no part of this royal fishery could pass by the grant of the land adjoining, by the gen-

(*a*) Whistler's case, 10 Rep. 63. (*b*) Rex *v.* Episc. Rochester, 2 Mod. 4.
(*c*) Lee *v.* Browne, 1 Freem. 207.
(*d*) Fishery of the Banne, Davies, 55. Duke of Somerset *v.* Fogwell, 5 Bar. & Cress. 875.

eral grant of all fisheries; for this royal fishery was not appurtenant to the land, but was a fishery in gross, and parcel of the inheritance of the Crown by itself; and general words in the King's grants shall not pass such special royalty, which belongs to the Crown by prerogative; for mines royal, amerciaments royal, or escheats royal, should not pass by general words, of all mines, amerciaments, and escheats. (*a*)

*It was also agreed, that where the King granted to Sir R. M. all the territories adjoining to the river, and all fisheries within the territory, *exceptis tribus partibus piscariæ de Banne;* the fourth part of the fishery should not pass to him, for the King's grant should pass nothing by implication. (*b*) *56

22. If the King grants the manor of D., with the appurtenances, and all other lands, pastures, woods, *et hæreditamenta ante hac cognita, usitata, accepta, vel reputata, ut membrum vel parcella manerii prædicti;* a wood which was not parcel of the manor truly, and in right, that is, *facto et jure,* shall not pass, though it be averred that the said wood, *adhunc antea fuit reputat' ut parcel' manerii prædicti;* without saying that it had been reputed parcel, time out of mind. And if it had been averred that the wood was reputed parcel of the manor, time out of mind, &c., though in the case of a common person, proofs of such issue might be by vulgar and diffused reputation of people of the same vill, or of other manors or vills adjoining, &c., or of the body of the county; yet in the case of the King, in such issues, as to the word "*reputation,*" the evidence or proof should not be by such vulgar and diffused reputation of the people; but the proofs ought to be by some matter of record or writing, as by the express valuation of it, between the prince and his subject, in the particulars of the purchase; or in the surveys and books of accounts of the auditors and receivers, bailiffs, and such officers and ministers, always entered and answered in the rolls and books, as parcel of the manor; otherwise it was not any proof of reputation in the case of the King. (*c*)

23. Whenever the King is *misinformed* in the nature of his estate, so that his intent cannot take effect; or where, in a King's grant, there is such a *misrecital, false surmise,* or *false considera-*

(*a*) Plowd. 333.

(*b*) Att.-Gen. *v.* Turner, 2 Mod. 102.

(*c*) Rex *v.* Imber and Wilkin, 2 Roll. Ab. 186. See also Att.-Gen. *v.* Marquis of Downshire, 5 Price, 269.

tion, as to show that the Crown was *deceived*, the grant will be *void*.

24. King Henry VIII., being tenant in tail of the manor of Abbottesley, with the reversion to him, his heirs and successors, gave by his letters-patent, the said manor to Walter Walshe, and to the heirs male of his body. The question was, whether this gift was good or not, and it was held, that it was void; because the King, having only an estate tail himself, could grant only for his own life, for he could not grant a greater estate than
57* *he had; so that being ignorant of the estate he was entitled to, he was deceived in granting it. (*a*)

25. If the King grants an office for life, and after grants it in reversion to B, which is void, and afterwards, reciting the grant to B as a good grant, he grants it to commence after the grant to B; the King is deceived in this last grant, and therefore it is void. (*b*)

26. If the King recites, that where, by letters-patent, the office of Marshal of the Court of King's Bench was granted to J. S. for life; and that the said J. S. had surrendered it; and that in consideration of this surrender, the King granted the office to J. D. for life. If the office was not in fact granted to J. S., or if he did not surrender it, the grant to J. D. will be void, because there were no such considerations as were recited. (*c*)

27. Queen Elizabeth, having right to present to a living as patroness, by letters-patent, granted the presentation *ratione lapsus;* it was held void, because she was deceived as to her title. (*d*)

28. It is laid down by Popham, that if the Crown should let the manor of D. *quod quidem manerium* is of the annual value of £4, where it is not let for such a rent, and the rent or value is misrecited, yet the lease would be good, because there was a certainty before; and the addition of *quod quidem*, &c., was not material. But if the Crown let the manor of D., of the annual rent of £4, which was intended to be of such a value, and was let at a greater rent, or appeared upon record to be of a greater value, it would be void; because in the first case, the Crown intended to pass the manor; and the addition of the *quod quidem*, &c., was but to add another certainty; but when it was in one

(*a*) Case of Alton Woods, 1 Rep. 40, Moo. 418.
(*b*) Curle's case, 11 Rep. 4.
(*c*) Mead *v.* Lenthal, 2 Roll. Ab. 189.
(*d*) Green's case, 6 Rep. 29.

sentence, that it was of such a value, and that *in tali parte* the intent of the Crown appeared not to grant a thing above such a value, it was otherwise. (*a*)

29. In Bacon's Abridgment, the following *exceptions* are laid down to the above cases: "*First*, that in the construction of letters patent, *every* false recital,† in a part material, will *not vitiate* the grant, *if the King's intent sufficiently appears.*" (*b*)

*30. Thus, where the King made a grant to a person as a knight, who in fact was not a knight, though the grant was held void, for this reason, by the Court of King's Bench, yet the judgment was reversed by the House of Peers. (*c*) *58

31. "*Secondly*, that if the King is not deceived by the false suggestions of the party, but only *mistaken by his own surmises*, this will *not vitiate* his grant."

32. King Charles II. granted the office of searcher at Plymouth to John Martin, *durante bene placito;* afterwards by other letters-patent, reciting the grant to Martin, he granted this office to Fryer for life, to commence after the death, surrender, or forfeiture of Martin. Fryer afterwards surrendered his letters-patent to the King, who, in consideration of the surrender, granted the office to Henry Kempe for life, to commence after the death, surrender, forfeiture, or other determination of the estate of Martin; and afterwards to William Kempe for life, to commence after the death, surrender, forfeiture, or other determination of the estates of Martin and Henry Kempe. (*d*)

Upon the death of King Charles II., a *scire facias* was sued out to repeal these letters-patent. Sir S. Eyre, Just., said, it was objected that the King was deceived in his grant to Fryer, which was to commence after the death, surrender, or forfeiture of Martin; for the estate Martin being only an estate at will, it could not be surrendered or forfeited; because those acts which in cases of other particular estates would amount to a forfeiture

(*a*) Mason *v.* Chambers, Cro. Jac. 34. Alcock *v.* Cooke, 5 Bing. 340.

(*b*) Bac. Abr. tit. Prerog. F. 2. (Rex *v.* Bp. of Chester, 1 Ld. Raym. 292, 302, 303. 2 Salk. 560. 5 Mod. 297. Show. Parl. Cas. 212, S. C.)

(*c*) Rex *v.* Episc. Chester, 1 Lord Raym. 292. Show. Parl. Ca. 212.

(*d*) Rex *v.* Kempe, 1 Ld. Raym. 49. (4 Mod. 275. 2 Salk. 465, S. C.)

[† The King's grant may be explained by recital. Lowe *v.* Govett, 3 Bar. & Adol. 863.]

or surrender, in case of an estate at will, amounted to a determination of the will; and therefore there could not be a surrender or forfeiture of an estate at will. And in fact the estate of Martin did not determine by his death, surrender, or forfeiture, but by the death of King Charles II.; and therefore the grant to Fryer could not take effect, because Martin's estate did not determine by his death, surrender, or forfeiture.

To answer which objections, he said, that it ought to be considered. 1. When the King shall be said to be deceived to avoid his grant. 2. In what manner the grant of the King should take effect; and what construction it should have.

As to the first, where the matter expressed to be suggested on the part of the grantee was false, and to the prejudice of the King; there, if the King was deceived, that would avoid the grant. But where the words were the words of the King, 59* and *it appeared that he had only mistaken the law; there he should not be said to be deceived, to the avoidance of the grant; as if there was an estate *in esse* not recited; or when the grant was recited to be of less value than it actually was, by the suggestion of the party; there the King was deceived, and the grant should be void. For, in the first case, the intent of the King was to grant an estate to take effect in possession, which intent could not take effect, because there was an estate before *in esse*, not recited. In the second case, if the grant were good, the King would grant more than he had designed to do. But if the King was not deceived in his consideration, nor otherwise to his prejudice, but his intent was to pass the lands, only he was deceived in the law, nevertheless his grant should be good.

2. In what manner the letters-patent of the King should be construed, when he was mistaken in his own words and affirmation. And he said, that it was a rule in law, that where the King was not deceived by the suggestion of the party, and it appeared by the letters-patent, that the intent of the King was, that the patentee should take; such construction should be made, that the grant should not be void.

To apply this to the case. In the letters-patent to Fryer, the King was not deceived, for the precedent letters-patent were truly recited, and the suggestion was true; and the intent of the King

was, that Fryer should take by these patents; and therefore such a construction ought to be made, as that the grant might take effect.

Lord Holt concurred, and judgment was given, that the letters-patent were good.

33. "*Thirdly*, that though the King *mistakes*, either in matter of law or fact, yet if this is *not any part of the consideration* of the grant, it will *not vitiate* it."

34. King Henry VII. granted to Lord Chandos a manor in tail; and the same King, by other letters-patent, reciting the former grant, and that the said Lord Chandos had surrendered the same to be cancelled, and that the same had been cancelled, by reason whereof the King was seised in fee; did grant the said manor to Lord Chandos and his wife, and the heirs of Lord Chandos. (*a*)

It was contended, that the second grant was void.—1. Because the estate tail was not recited as an estate tail continuing, *whereupon the reversion might be granted, but as an *60 estate tail determined; and therefore the King granted it as a thing in possession, when in truth he had but a reversion, expectant on an estate tail. 2. Because the King was deceived in his grant; for the King, by the suggestion of the party, thought that by the surrender of the first letters-patent, the estate tail was defeated and determined, by reason of which the King became seised in fee, in which the King was deceived. 3. Because the King was deceived in the estate he granted; for he intended to grant an estate in fee in possession, and not a reversion expectant on an estate tail.

After great deliberation, it was resolved, that the reversion passed. And as to the said three objections, it was considered how much of the said recital was the suggestion of the party, and how much the affirmation of the King himself. And it was held, that the recital of the estate tail, and that the patentee had surrendered, were, in judgment of law, the information and suggestion of the party; but the clause, that the King was seised in fee, was the conclusion of the King himself, in which he mistook the law. Also, the party informed the King, that he had delivered up the letters-patent to be cancelled, upon which the King

(*a*) Chandos's case, 6 Rep. 55.

affirmed that they were cancelled; that was not the affirmation of the party, but of the King; and the affirmation of the King, on the information of the party, when it was not made any part of the consideration, should not avoid his grant. And it was not like the case of Alton Woods; for there the King was not informed of his true estate, and his grant could not take effect, without fraction of estates, or wrong done. (*a*)

35. *Fourthly*, that the words *ex certa scientia et mero motu*, in the King's charters and letters-patent, do occasion them to be taken in the *most benign and liberal sense*, according to the *intent* of the King, expressed in his grant. (*b*)

36. It has been stated, that royal mines do not pass by a grant of all mines, minerals, &c. But Lord Chief Justice Dyer has said, that if the Crown has a mine royal in the soil of J. S., and grants, *ex gratia speciali, certa scientia, et mero motu*, all mines in the lands of J. S., the mine royal shall pass; for else the words would be void and without effect; because the Crown cannot have a base mine in the soil of another; and therefore when the Crown says *ex certa scientia*, and recites that it is in the
61* *soil of another, it shall not be taken to be misconusant of the thing. (*c*)

37. There are, however, several cases, in which the words *ex certa scientia et mero motu* were not held sufficient to establish the King's grant, as in Lord Lovel's case, which has been already stated. (*d*)

38. So where King Henry VII. being seised of two manors, Ryton and Condor, granted, *ex certa scientia et mero motu, totum illud manerium de Ryton & Condor, cum pertinen', in com' Salopiæ;* it was held, that the grant was void, for the King was deceived. (*e*)

39. In the same manner, where Queen Elizabeth, being seised of the manors of Milburn and Sapperton, in the county of Lincoln, granted, *ex certa scientia, &c., totum illud manerium de Milborn cum Sapperton, in com' Lincoln';* it was held that neither of them passed. (*f*)

40. "*Fifthly*, that though, in some cases, *general words* of a grant may be qualified by the recital, yet *if the King's intent is*

(*a*) *Supra*, s. 24.
(*b*) See 5 Price, 217. *Supra*, s. 11. (6 Rep. 56.)
(*c*) *Supra*, s. 14. Plowd. 337.
(*d*) *Supra*, s. 13. (10 Rep. 112, 113. Plowd. 502.)
(*e*) 1 Rep. 46 a.
(*f*) 1 Rep. 46 b.

plainly expressed in the granting part, it shall enure according to that, and is *not to be restrained by the recital*." (*a*)

41. In Bozoun's case, 26 and 27 Eliz., it was held, that a clause of *non obstante* would supply the defect of a misrecital; and this doctrine was confirmed in the following case. (*b*)

42. King Henry VIII. granted the manor of Sherborn, in the county of York; and then followed these words: "all which are of such a yearly value as is expressed in such a particular," with a *non obstante* of any misrecital of the true value, or that they were of greater value. The value was not truly expressed in the particular. (*c*)

Lord Chief Baron Hale held the grant good. He said that the reason why a mistake in the consideration, or in the King's title, or the non-recital of an estate, or lease in being, shall vitiate the King's patent, was, because by his prerogative he ought to be truly informed of his case; but it was otherwise in the case of a common person, whose grant was to be taken most strongly against himself; and here the *non obstante* aided those defects, and it was the proper office of a *non obstante* to do so, as appeared in Bozoun's case. (*d*)

(*a*) Rex *v.* Bp. of Chester, 1 Ld. Raym. 292. 5 Mod. 297.) 10 Rep. 65 b. (Legat's case, 10 Rep. 112 b.)

(*b*) 4 Rep. 34.

(*c*) Att.-Gen. *v.* Hungate, Hard. 231.

(*d*) Holland *v.* Fisher, Sir O. Bridg. Rep. 181.

62 * * TITLE XXXV.

FINE.

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267 * * TITLE XXXVI.

COMMON RECOVERIES.

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447 * * TITLE XXXVII.

ALIENATION BY CUSTOM.

NOTE. The methods of alienation by Fine and Recovery are now abolished in England, by Stat. 3 & 4 Will. 4, c. 74. They were never much used in any of the United States; in many of the States were never known; and in all, they have long since become obsolete. And as the shortened periods of the statutes of limitation, and the statutes enabling tenants in tail to aliene in fee, have probably served to quiet all titles intended to be secured by fines and recoveries, it is not deemed necessary to encumber this new edition with those venerable but now less useful branches of learning. See 4 Kent, Comm. 497–499. For similar reasons the Title of Alienation by Custom is also omitted; the tenure by copyhold having never been known here.

END OF VOL. V. OF CRUISE'S DIGEST.